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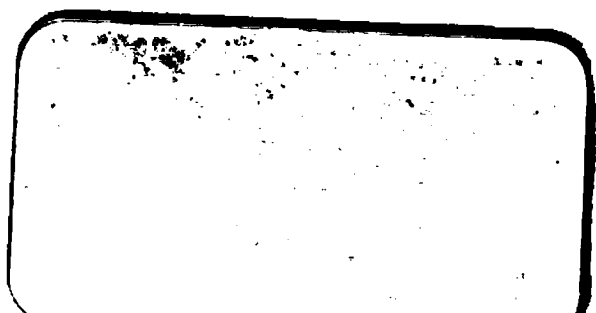
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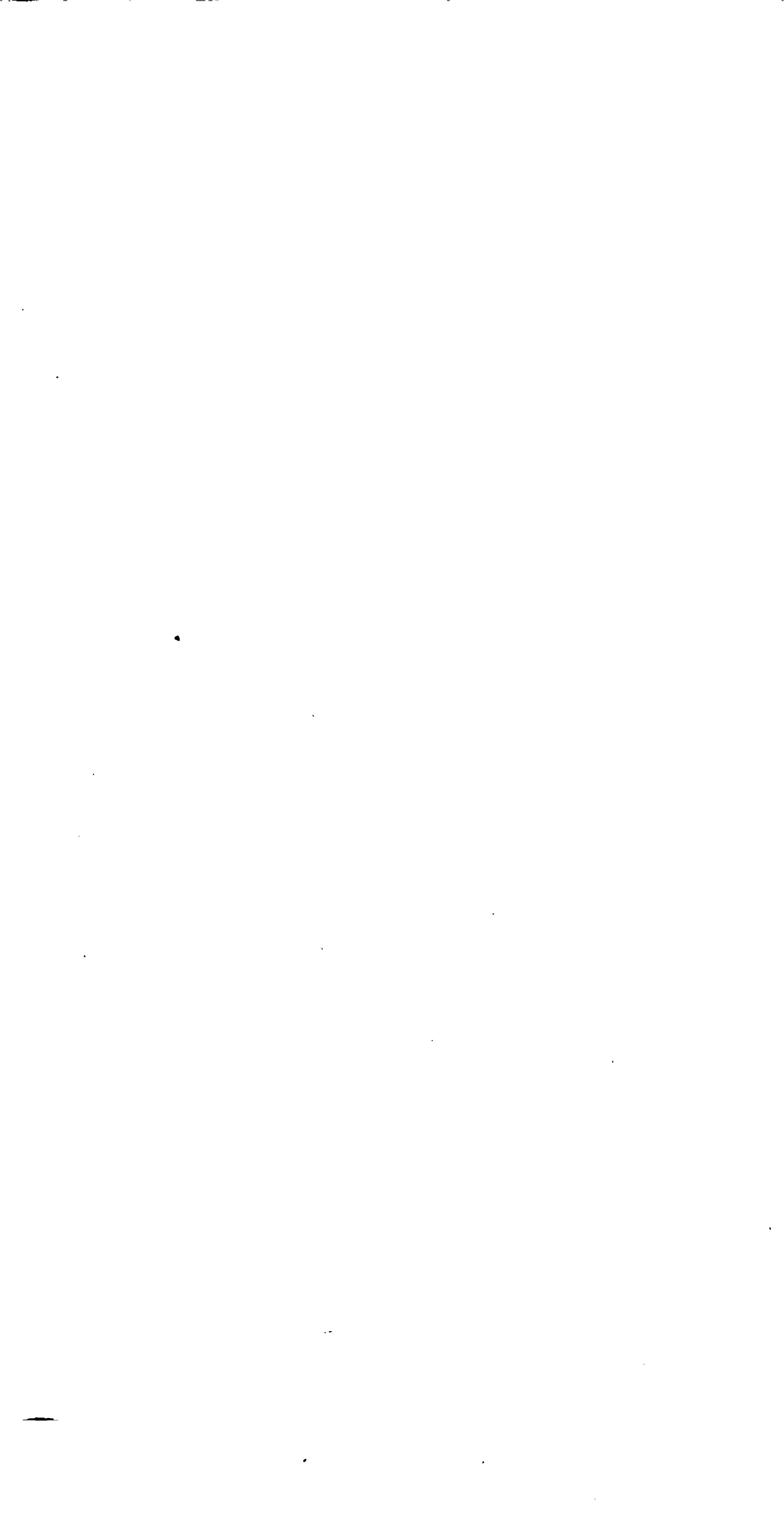
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What Things of the Wife accrue to the Husband by the Marriage.

What Acts, Charges, Forfeitures by the Husband, shall bind the Wife after his Death.

Of Jointures and Pleadings, Fines and Recovery, Conveyances, &c. relating to Baron and Feme.

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THE CONTENTS.

CHAP. I.

THE Consideration of Marriage in the Eye of the Law. Of Affiances, and where the Breach thereof is punishable. When the Solemnization of Marriage in the Church began; and how the ancient Manner of Espousals was. If Marriage be once done by one in Orders, not to be dissolved for a Defect of Ceremony, as to Time, Place, or Licence.

CHAP. II.

The Nature of a Feme Covert. Wherein a Feme Covert and an Infant differ as to Privilege. What Acts the Husband may do to the Wife, and what the Wife to the Husband; and the Explication of the Rule that they are one Person in Law. And in what Respects she is said to be sub potestate viri. Of the Change of her Name and Dignity.

The CONTENTS.

CHAP. III.

Of Bastardy.

Of the Writ de Ventre inspiciendo. The Form of the Petition for such a Writ. The exact Time for the Birth of an Infant. Of the Sheriff's Proceedings in this Writ in the Case of a Widow, and in the Case of a Wife. In what Case the Child may choose his Father. Who shall be said to be a Bastard, or not. Who shall be accounted a Bastard though born within Marriage. The Signification of Mulier in our Law. Bastardy in what Court to be proved, and why the Ecclesiastical Courts cannot proceed to the Trial of Bastardy before they receive Commandment out of the King's Courts. The Credit of the Bishop's Certificate in such Case. Where the Trial of Bastardy shall be per Pais, and where by the Ordinance. The Difference between general Bastardy and special Bastardy, and where each is to be tried. Bastard by our Law, and Mulier by the Civil Law. Bastard by the Spiritual Law, and Mulier by the Common Law. What Divorces shall bastardize the Issue. Who only may write to the Bishop to certify Bastardy. Of Bastards Eigne and Mulier puisne in case of Descent. How Estates may be limited to a Bastard by reputed Name.

The CONTENTS.

CHAP. IV.

Queen.

How the Queen is an exempt Person from the King in our Law. She is not to find Sureties, nor to be amerced. She is to be sued by a Praecipe, not by Petition. She may inform by her Attorney in Chancery. Queen Consort or Queen Dowager in case of Treason, how to be tried. The Penalty for any to marry the Queen Dowager without the King's Licence. She is not restrained by the Statute of 1 H. 4. c. 6. She and her Tenants not to pay Toll.

CHAP. V.

Privileges of a Feme Covert.

Mortuary to be paid at her Death. She is not within the Statute of W. 2. c. 25. What Conditions in Law shall bind the Wife, or not. She may not be a Constable, though the Custom be to elect by Houses. Lapse shall incur against her. Laches not to be accounted against her for not Entry or Claim to avoid Descent. What Privilege the Wife shall have in Suits by reason of the Husband's Privilege.

The CONTENTS:

CHAP. VI.

Who shall be said to be Baron and Feme, or what Cases Marriage shall be said to be val or not. 1. In respect of Age: Of the Time Agreement or Disagreement to the Marriage. What shall amount to such Agreement or Disagreement. 2. In respect of Affinity or Consanguinity. What Marriages are within the Levitical Degrees or not; with several Modern Cases of Precontracts.

CHAP. VII.

Trial of Marriage.

Where and in what Cases Trial of Marriage shall be by the Bishop's Certificate, and where it is not. Of the Issue N'unique accouple en loy: Matrimony, where to be tried. If the Issue be, whether she be a Feme Covert or Feme Sole, where to be tried, and the Reason of the Difference. The Diversity between a Marriage in Right and a Marriage in Possession, or de Facto; and the Consequence of the Diversity. The Day and Place is omitted in the Bishop's Certificate, if good. The Form of the Bishop's Certificate. The Credit the Law gives to it.

CHAP.

The CONTENTS.

C H A P. VIII.

riage, and the Consequence of it by Law.

*What Alterations are made by Marriage as to
Names of Dignity ; as to Change of Name on
States devised. Where or in what Cases
Marriage shall amount to a Countermand or
Revocation of Livery or Attornment. If Mar-
riage be a Revocation of a Will, or Counter-
mand of Arbitrament. If Marriage be a
Discharge of a Condition by way of Disability.
If a Lady of a Manor marries a Copyholder, if
it be a Suspension. In what Cases Marriage
be a Release in Law, or not. Woman Jailor
marries a Prisoner, if it be an Escape, or not.
Where a Term is extinct by the Intermar-
riage, or not. In what Cases the Husband
shall be said Assignee of the Wife, or not.*

C H A P. IX.

*What Things of the Wife are given, or do accrue
to the Husband by the Intermarriage, or not.
What he gaineth of his Wife's Lands in Fee by
Marriage. What Estate or Interest he gaineth
in her Chattels Real, and Chattels Mixt, which
are partly in Possession, and partly in Action.
What he gaineth in her Chattels Personal, or in
Choses in Action, Diversity between Property in
personal Goods and a bare Possession. What
Things of the Wife the Husband may release
or discharge, or not ; as Obligations, Annui-
ties, Promises, &c. What Acts, Charges, or
Forfeitures of the Husband shall charge the
Wife after his Death. How and wherein the
Wife*

The CONTENTS.

Wife shall be bound by her Husband's Subjection to an Award, or for Rent of Owelty of Partition. How the Husband may charge the Land of the Wife by Rent, Statute, Judgment, &c. What Lands of the Wife shall be put in Execution for the King's Debt upon the Husband. What Act of the Husband amounts to a Forfeiture of the Wife's Land, and how long. What Acts of the Husband and Wife shall be construed as the Act of the Wife so as to bind her after his Death, or not. What Acts or Facts of the Wife the Husband shall be punished: Et e contra. Of Paraphernalia. What Things or Actions the Wife may have after the Death of the Husband. What Actions Real; what Things and Actions Personal; as Obligations, Recognizances, Goods or Money purloined. What Things Real, Rents, Leases, &c. What Things the Husband shall have after the Death of the Wife as Leases in Trust, Arrears of Rents, Prejudgments, &c. What Things the Wife may receive in good after the Death of the Husband, as Bonds and Rents of Acceptance.

CHAP. X.

Tenant by the Courtesie.

The Nature of Tenancy by the Courtesie. What Estate a Man shall be Tenant by Courtesie, or not. If he shall be Tenant by Courtesie of an Estate in Suspence, or not. What Cases the Husband shall be Tenant by the Courtesie, where the Wife's Estate is devisable by Condition. Four Things belong

The CONTENTS.

Tenant by the Courtesie. What Seisin of the Wife it must be to make the Husband Tenant by the Courtesie. In what Cases a Man shall be Tenant by the Courtesie of a Seisin in Law. How a Man shall be Tenant by the Courtesie in respect of the Issue, and how he may plead the having of Issue.

CHAP. XI.

Dower.

Nature of Dower. Qualifications of the Wife to enable her to have Dower. What Divorce shall avoid Dower, or not. Of the Endowment of a Wife de facto and de jure. What Seisin the Husband must have to make the Wife dowable. Of what Seisin of the Husband the Wife shall not be endowed. Of what Estate a Woman shall be endowed. Of what Inheritances intire, and not deviseable, she shall be endowed, and after what Manner. In what Cases of Lands or Tenements, which are deviseable, and which the Heir of the Husband shall inherit, yet the Wife shall not be endowed. How she shall be endowed of improved Lands. If she shall be endowed of Lands mortgaged. For and in what Respect of Disabilities a Woman shall not be endowed. Where the Wife shall lose her Dower by the Attainder of her Husband, or not. Whether an Alien Woman shall be endowed, and how. What Act of the Wife shall bar her Dower. Several Cases of Elopement and Divorce relating thereunto. Assignment of Dower, by whom and how to be made. What Assign-

ment

The CONTENTS.

ment of Dower is against common Right. What Things may be assigned in Dower. Of Endowment by Metes and Bounds. Assignment of Dower by the Sheriff, and By the Heir's Assignment in Chancery. the Tenant in Dower having Damages. Charges made by the Husband the Wife dowed shall avoid, or not. The Writ and declarations in Dower. Pleadings in Dower. What Pleas are good, or not, in Bar of Dower Trial, Evidence, Issue in Dower. Damages Judgment, and Execution. Of the ratione parte bonorum, according to the Custom of London.

C H A P. XII.

Of Jointures.

The Nature and Reason of the Statute of 27 8. cap. 10. of Jointures. Construction of said Act relating thereunto. What Estates are Jointures within the said Statute, or not. What is a good Jointure within the Statute 11 H. 7. and what Alienation by the Wife is within that Statute, illustrated in several adjudged Cases. What Agreement or Waiver a Woman may make as to her Jointure; and what shall amount to an Agreement or Refusal Of Pleadings.

C H A P. XII.

Of Fines and Recoveries.

Of a Fine levied by a Feme Covert as a Feme Sole, and the Operation of it. The Reason why

The C O N T E N T S.

Why a Feme Covert shall be barred by the Fine. The Operation of a Fine by Baron and Feme illustrated by several Cases. Of Commissioners passing a Fine of a Feme Covert Infant. Of the Mode of Acknowledgment. Where a Feme Covert shall be examined, or not. Where a Feme Covert shall be barred by Fine and Non-claim. Of the Declaration of Uses by a Feme Covert. Of a Fine levied to Baron and Feme, and the Operation of it. Of a Common Recovery. How a Feme Covert may be Tenant to a Præcipe. A Feme Covert barred by a Common Recovery. Whether a Feme Covert, in passing a Recovery, ought to be examined privately. Recovery by Baron and Feme within Age, and Appearance by Attorney, if it be Error. Of Recovery by Default.

C H A P. XIV.

Attornment.

What Acts of the Husband or Wife shall amount to an Attornment. Avowry for Rent out of the Wife's Land, in whose Name it ought to be. Where and to what Purposes a Feme Covert shall be said a Disseisoress, without her proper Act or Entry, and where, and to what not. What Act of the Husband shall be a Discontinuance of the Land of the Wife, and what not. What was a Discontinuance at the Common Law. Where a Descent cast during the Coverture shall toll the Entry of the Wife, or not.

C H A P.

The CONTENTS

CHAP. XV.

Remitter.

The Nature and Reason of Remitter.

Act shall be a Remitter to the Wife. Remitter wrought by a voidable Estate. Reversioner expectant on an Estate for Life works Remitter. Notwithstanding what Acts are made in remissions by the Husband the Wife shall be remitted. Of Remitter by Acceptance. Of the Wife being remitted during the Coverture, after the Death of her Husband, the Remitter, and where not. No Discontinuance of the Husband shall defeat the Remitter and the Reason. Where a Warranty depending on an Infant, or a Feme Covert, shall be a Bar, and where not. Where the Baron and Feme shall be Joint-tenants; and where by Intireties, and where by Moieties, with several Cases to illustrate that curious Learning how it was at Common Law, and how now by the Statute of Uses.

CHAP. XVI.

Conveyances.

What shall be said to be the Deed of the Husband and Wife. Of a Feoffment by the Husband of the Wife's Land. Where the Wife's Grant shall be void if she join with her Husband, is void on Surrender by the Husband, how it operates. What shall amount to a Surrender, or a Release of the Husband of the Wife's Right to Rent. Of his Release of Mortgages.

The CONTENTS.

be paid after the Wife's Decease. Of Exchanges of the Land of the Wife, and what shall be a good Confirmation of it by the Wife. How a Man may execute an Estate to his Wife. Of the Christian Names of Women in Grants.

CHAP. XVII.

Leases.

A Lease for Lives made by Baron and Feme. Of a Lease made by the Husband of the Wife's Land, and how and wherein it shall bind the Wife, or not. What shall be a good Lease warranted by the Statute of 32 H. 8. c. 28. The Qualifications of such Leases to bring them within the Statute. What Acceptance of the Husband shall affirm a voidable Lease. What is a good Lease by Baron and Feme to bring Ejectment. Of Leases for Years made to Baron and Feme. Diversity between a Lease for Life and a Lease for Years made to a Feme Covert. Lease to a Feme Covert when it shall be said to vest. Of a Lease for Life made to Baron and Feme. If the Husband may grant it when the Lease is made to Baron and Feme. If the Husband may grant it when the Lease is made to the Survivor for Years. How if the Remainder be to the Heirs of the Survivor. Of Leases for Life made by Baron and Feme. Diversity where Livery is made by the Lessor in Person, and where by Letter of Attorney.

CHAP.

The CONTENTS.

CHAP. XVIII.

Wills.

How and in what Cases a Feme Covert make a Will. What she may devise with the Consent of her Husband. If she make a Declaration in the Nature of a Will without the Assent of the Husband. Several Cases of the Husband's being bound to permit his Wife to make a Will. Of Devises to the Wife by the Husband or others, the Constitution of such Devises. What Devise by Implication, or not. Of a Feme Covert's Assenting to a Legacy. If the Husband may devise the Term made to him his Wife. Wife Legatee of Goods is not Executor, if the second Husband's Executors shall have them.

CHAP. XIX.

Rent, Reservation, Emblements.

In what Cases the Wife shall not have the Rent, tho' the Reservation be to her. The Husband grants a Rent out of the Wife's Term, and dies; if the Wife shall hold it discharged, and why. What Arrears of Rent the Statute 32 H. 8. cap. 37. gives the Husband Power to recover. Feme Covert received the Rent of the Tenants, they not having Notice of the Coverture. Where the Husband shall be charged with the Arrears. Avovery for Rent out of the Wife's Land, how to be brought. What

THE CONTENTS.

Where the Executor of the Husband shall have the Rent, and not the Wife. Where the Wife shall have the Emblements, and where the Husband.

CHAP. XX.

Copyhold.

*What Acts of the Husband shall destroy, or for-
feit the Custom of the Wife's Copyhold Estate,
and what not. Where she shall have her Vi-
sage, though the Freehold be severed from the
Manor, and where not. Of Grant and Sur-
render to and by Baron and Feme, and the
Instruction thereupon. Customs of Manors,
as to Wives or Widows, which are good, or
not.*

CHAP. XXI.

Vide Will.

*Of the Wife's Separate Disposition. Where the
Money which the Wife had separate Power to
dispose of, to whom it shall be paid. Separate
Maintenance on a Proviso, and the Plead-
ing. Where Detainer of the Husband is a
breach of the Condition. Covenants in a Deed
of Separation between Baron and Feme, and
for allowing yearly Maintenance, and Plead-
ing thereupon.*

The CONTENTS.

C H A P. XXII.

What amounts to a Disposition of the Term by the Husband, to vest the Interest in him, his Executors and Administrators. Condition in Mortgages shall survive the Husband or not. If the Mortgage be for the Wife's Term doth amount to a Disposition at Law. Diversity between a Feoffment, Bargain and Sale, as to the Extinguishing of the Term of the Wife. Of the Forfeiture of the Wife's Term by the Outlawry or Banishment of the Husband, or on Extent or Recovery by the Husband in Ejectment of the Term. If Payment of the Debts of the Husband Intestate, vests a Term in him. What for the Wife the Husband may dispose of, and what not. What shall amount to a Forfeiture of the Wife's Term.

C H A P. XXIII.

What Acts done, or Contracts made by the Husband shall bind the Husband, or not. Scott v. Manby's Case, as to that Point, and Cases relating thereto, and the Manner of bringing the Action, and declaring therein.

The CONTENTS.

CHAP. XXIV.

Feme Covert, { Executrix,
 { Administratrix.

Of a Feme Covert, may be made Executrix, and of what Things; what Things the Administratrix of the Wife shall have, and not the Husband, as Choses in Action, &c. Debt recovered by Baron and Feme Executrix, and she dies, the Husband shall have Execution. What Things Feme Covert Executrix may do without her Husband, or not. Obligees makes the Wife one of the Obligors Executrix, quid operatur. Legacy devised to the Wife, who is made Executrix. Whether she shall be, in as Executrix, or as Legatee. Of her Assent to a Legacy. Debt, as Executrix, not extinct by the Inter-marriage, and why. Feme Executrix takes the Obligor to Husband, if that be a Release in Law. Where the Husband shall be charged with the Waste of the Wife as Administratrix, and the Manner of Proceedings by the Sheriff in such Case; and whether Execution shall be de bonis propriis of the Husband. Of Actions brought by Baron and Feme as Executrix or Administratrix. Where Administration belongs to the Baron and Feme.

CHAP.

The CONTENTS

CHAP. XXV.

ACTIONS. SUITS.

Abatement of a Writ or Suit in Law or Equity by Marriage or Death, pending the Suit the Wife be put before the Husband, the Suit abates. Feme Plaintiff after Writ of Error and before the Return marries, if the Suit shall abate. Feme Sole, depending a Suit in Chancery, takes Husband, if the Suit shall abate. How it is if she be Defendant. Actions which the Husband may have for Wrongs done to the Wife. Indictment for Rape on and Feme, and against Baron and Feme. Where and in what Cases Wives are liable, without their Husbands, or not.

CHAP. XXVI.

Joinder in Action.

Where and in what Actions Baron and Feme shall join, and where and in what Actions the Husband only shall have an Action. Diversity between an Action which affirms Property, and which disaffirms Property. Four general Rules of the Baron and Feme's Joinder in Action, and Cases under each to direct where Baron and Feme join in the Action, or it may be brought by the Husband only. Particular Actions Trover, Indebitatus Assumpsit, Account, Redempcion, Ejectione Firmæ, Actions for Rents, Actions for Tithes, Covenant, Writ

The CONTENTS.

Debt on Bond or Contract, Trespass, Battery, Assault, Action on the Case for Assumpsit, Action on the Case for Torts, Possible Entry, Writ of Error, &c. and the Manner of declaring in such Actions. Of Actions brought by a Feme Covert against a Feme Covert. In what Cases a Feme Covert is enabled to sue without her Husband. Of a Feme Sole Merchant.

CHAP. XXVII.

Of Actions brought by a Woman. Cui in Appell. The Nature of an Appeal, the Process, Pleadings, and Trial in an Appeal. Quare Impedit. Actions on the Case for Scandalous Words by Baron and Feme against Baron and Feme, with Declarations and Pleadings therein, and where Baron and Feme must join or be joined in the Action.

CHAP. XXVIII.

Actions against Baron and Feme. Traver, Debt, &c. Actions on the Case, Waste, Covenant, Account, Audita Querela, with the Manner of Declaring and Pleading in each Action. Actions against Baron and Feme by reason of Offences against a Statute. Information against Baron and Feme for the Recusancy of a Wife by the Stat. 1 Eliz. & 23 Eliz. In what Actions the Husband shall be charged after the Death of the Wife. Where the Default of the Wife shall be the Default of the Husband, and contra. Where the Wife shall be received

The CONTENTS

*received upon the Husband's Default.
of Law by Baron and Feme. In what
the Husband shall appear, and be comp
pat in Bail for his Wife or not. Of
and Feme being sued to the Outlawry, a
the Entry shall be.*

C H A P. XXIX.

Declarations and Pleadings.

*The manner of declaring against Bar
Feme, or by Baron and Feme. In what
the Life of the Wife must be averred,
Where the Husband shall be estopped
that his Wife is remitted, and yet she s
received. In what Cases the Wife shal
in, and be received in Default of her Hu
Of the Wife's Pleading without her Hu
The manner of pleading Coverture. C
Conclusion of Pleas in Actions by or
Baron and Feme. Where it is necessar
ver the Assent of the Husband. Travers
that the Wife died seised. Adtunc &
Uxor, if good. Of Estoppels. Error a
because she was a Feme Covert. Divorce
ed. Outlawry pleaded. Where there betw
men of a Name in Debt on Bond, how to
Where the Parol shall demur for the N
of the Husband and Wife.*

The CONTENTS.

CHAP. XXX.

Issue. Evidence. Trial. Verdict.

Trial of Marriage. Death of the Husband, where triable, and how; whether by Proofs or in Pais. If the Baron and Feme shall join in a Challenge. In what Case by the Evidence of the Wife she and her Husband were discharged of a Judgment. Where the Husband shall be a Witness for the Wife or not.

CHAP. XXXI.

Judgment. Execution. Damages.

Where Judgment against Baron and Feme shall bind the Husband surviving, or not. In what Cases a Feme Covert shall be taken in Execution. Writ of Error brought by all for the Coverture of one. The Coverture of a Woman not to be determined by Affidavit. In Action against Baron and Feme, where Judgment shall be quod Capiantur, or not. Where Baron and Feme both ought to be in Misericordia, or not. Baron and Feme in Execution, and the Wife escapes, if Action lies against the Sheriff. Where the Husband shall recover Damages Sole. Judgment that the Baron and Feme shall recover Damages, in what Cases good.

CHAP.

THE CONTENTS

CHAP. XXXII.

Of Divorce.

The Nature of a Divorce. What are good of Divorce. The several Kinds of Divorce. What Divorces declare the Marriage void in initio. Of the Divorce causa præconjugii, causa frigiditatis, causa affinitatis, consanguinitatis, and several Cases of each for dissolution. Of a Divorce a Mensa & Thoro, and the Consequences thereof. What made done by the Husband shall stand good notwithstanding the Divorce. Of Suits and Actions after the Divorce. Where, and in what Cases, notwithstanding a Divorce, the Wife shall be endowed, or not. Pleading and Trial. What Divorce shall bastardise the Children or not.

CHAP. XXXIII.

Offences against the Statutes concerning Wives.

Action on the Statute of 5 Eliz. c. 9. against a Husband and Wife for the Wife's non assensum, and Testificandum, and the Declaration against Bigamy against Stat. 1 Jac. c. 11. Of the Statute of Women, &c. Construction of the Statute, and of the Stat. 39 Eliz. c. 8. Of the Statute and Feme indicted of Perjury. Declaration against a Feme Covert for selling Land. In all Statutes which provide for actual Felonies, Femes Coverts shall be intended within the

1

BARON *and* FEME:

OR, A

TREATISE

OF THE

LAW concerning HUSBANDS
and WIVES.

CHAP. I.

Consideration of Marriage in the Eye of the Law. Of Affiances, and where the Breach thereof is punishable. When the Solemnization of Marriage in the Church began; and how the ancient Manner of Espousals was. If Marriages be once done by one in Orders, not to be dissolved for a Defect of Ceremony, as to Time, Place, or License.

THERE is no Consideration respected in the Law so much as the Consideration of Marriage, in regard of the Establishment of Families by Alliance, and the Continuance of them by Posterity. *1 Inst. 9. 6.* And therefore at Common Law, if a Man give Lands to a Man with his Daughter in Marriage, a Fee-simple had passed without

B out

out this Word (*Heirs*); and at this Day it is an Estate of Inheritance in Tail; and how valuable a Consideration it is for the raising of Money every Day's Practice and Experience can testify.

Sponsalia dicuntur futurarum nuptiarum conventio & repositio. Glanvil, lib. 6. c. 1.

If one be affianced to a Woman, and then forsake her, he is to be sued in Court Christian and not in a Court of Equity, for Breach of his Oath; *Si petit ipsum canonice inimeri* yet she may have Remedy for the Damage sustained for the Non-performance of the agreement; tho' others have said, that it is her Folly to trust his Word, and therefore she had no Remedy; *Quia Deus est procurator tuorum.* But it's much to be doubted, but a Remedy lies upon an *Assumpsit* at Law, as hereafter will in several Cases appear.

A Man may maintain an Action against a Woman for not marrying him according to her Promise.

One brought an *Assumpsit*, For that, in Consideration he had promised to marry the Defendant, she had promised to marry him; and refused: And the Plaintiff had a Verdict; and it was objected, That a Man could not have an Action, tho' a Woman might: But the Court held he might; and that a Man may maintain an Action for scandalous Words whereby he loses his Marriage, as well as a Woman. 2

Rep. 24.

Woman expresses her Consent by Signs, Evidence of a Promise on her Side.

A *Feme* brought an Action against one *Andersel*, upon a Promise of Marriage; and it was made of an express Promise by the Defendant, but none on the Woman's Part: And it was held by *Holt, C. J.* That if there be an express Promise by the Man, and the Woman countenance it, and by her Actions at that Time manifest any Signs of Agreement to the Matter, this

is a sufficient Evidence of a Promise on her
Side. 7 Mod. 172.

*When the Solemnization of Marriage in the
Church began.*

Before the Time of Pope *Innocent III.* there
was no Solemnization of Marriage in the Church,
and then it was first ordain'd; but before the said
Ordinance, Marriage was solemnized in such
form, viz. The Man came to the House where
the Woman inhabits, and in the Presence of her
Friends and Relations, took the Woman Home to
his own House; and this was all the Ceremony;
and for this Reason the Man is said *ducere uxorem*,
and then the Wife was said *nupta viro*,
by reason she is *quasi cooperta nube* (this Man)
to whom she hath subjected herself by Agree-
ment of Marriage. Now to read the several
Forms of Marriage in the several Countries of
the World is very delightful, but is not to the
Purpose of my present Design. *Moor 170.*

*See below,
that Marriage
is by the Law
of Nature.*

Now by our Law, Marriage being once law-
fully solemnized, and without Impediment, all
the World cannot dissolve it, if it be done by one
in Holy Orders, let it be at what Time and Place
it will be; as the Case was in *Siderfin's Re-
ports*, the Party was married at Twelve of the
Clock at Night in an Alehouse.

*By whom, and
at what Time.
Siderf. 64.
Tarry and
Brown. Sid.
432.*

And in *Car. 2.* a Libel was brought against
J. S. Parson, in the Spiritual Court, for marry-
ing without Licence in a Church. *J. S.* moves
for a Prohibition in the King's Bench, suggesting
that the Church is donative, and that the Do-
nor ought *ex jure* to appoint Commissioners
to inspect and visit this, and that the Ordinary
cannot intermeddle with it. The Suggestion
is good; by *Twisden*: But the other Justices,

*Maddox vers.
The Chan-
cellor of Pe-
terborough.*

because J. S. had another Living present would not grant a Prohibition.

*Clergyman
marrying a
Couple with-
out Bans or
Licence, for-
feits 100 l.*

By the 7 & 8 W. 3. cap. 35. it was acted, That every Parson, Vicar or Curate who should marry any Person in any Church or Chapel, exempt or not exempt, or in any other Place whatsoever, without Publication of the Bans of Matrimony between the respective Persons, according to Law, or without Banns or Licences for the said Marriages first had, should for every such Offence forfeit the Sum of 100 l. And he that should permit any other Minister to marry Persons in his Church or Chapel, without Bans or Licence, as aforesaid, should in the like Forfeiture of 100 l.

*The Man so
married 10 l.
the Clerk 5 l.*

And that every Man so married without Banns or Bans should forfeit the Sum of 100 l. And every Sexton, Parish-Clerk, and other Person acting as such, who should know or aid or assist at such Marriages, should forfeit the Sum of 5 l.

*Contract in
Words of pre-
sent Time true
Matrimony.
Vide Swinb.
7 Mod. 155.*

*Parties so con-
tracted can-
not marry else-
where.*

It is agreed, as well by Common Lawyers as Civilians, That Persons mutually contracted Spousals in Words of present Time, are void. (Man and Wife before God, in what Manner ever they are performed, (for nothing but a free, and mutual Consent is of the Essence of Matrimony.) And where there is any Evidence of such Contract, the Parties are so far accounted Man and Wife by our Laws, that if either of them proceed to marry elsewhere, the Invalidity of such Marriage may be bastardiz'd, and the Offender may be compell'd, by the Ecclesiastical Censures, to return to his or her former Spouse: The sole Question is, Whether a Marriage celebrated in a Conventicle, or before a Number of Lay Friends, shall convey the said Privileges to the married Couple and their

as a Marriage celebrated in the Face of the Church, that is, by one in Orders?

Haydon's Case, 9 Ann. Reg. as it is reported by Mr. Salkeld, may assist us in clearing up this Case: *Haydon*, and *Rebecca* his Wife, were Sabbatharians, and married by one of their Ministers in a Sabbatarian Congregation: The Form in the Common-Prayer Book was used, except the Ceremony of the Ring. They liv'd together Man and Wife for seven Years, and then *Rebecca* died; whereupon *Haydon* took out Letters of Administration to her: But *Gould*, and *Margaret* his Wife, who was Sister to *Rebecca*, obtained a Repeal, suggesting that *Rebecca* and *Haydon* were never married; and it appearing that the Minister who married them was a mere Layman, and not in Orders, the Letters of Administration which had been granted to *Haydon*, as her Husband, were repealed; and a new Administration granted to the said *Margaret Gould* as Sister: And this Sentence, upon an Appeal, was affirmed by the Court of Delegates at Serjeants-Inn in Fleet-street; for it was held, That *Haydon* demanding a Right due to him as Husband by the Ecclesiastical Law, he ought to shew himself a Husband according to that Law; and so the Court ruled: And a Case was cited of *Swinborn*, where such a Marriage had been ruled to be void: Mr. *Silkeld*, however, makes a Doubt, Whether the Wife, being the weaker Sex, or the Issue of such a Marriage, who are in no Fault, may not be intitled by such Marriage to a Temporal Right, altho' the Husband himself, who was in Fault, should never intitle himself by the mere Reputation of a Marriage without Right?

A Couple married in a dissenting Congregation; the Husband not allowed to administer to his Wife, because not lawfully married.

The Sentence confirmed by the Court of Delegates.

Husband must shew himself married according to Law, to intitle himself to Administration.

An Act of Parliament to confirm the Marriages during the Usurpation. How Marriage is to be pleaded.

Whether the Wife or the Issue shall be prejudiced by the Marriage being unduly solemnized.

The Act of the 7 & 8 W. 3. seems to admit, that none but those in Orders can marry, so as to entitle the married Couple to the Privileges of a lawful Marriage. Or why was that Penalty laid on the Clergy only?

Mr. Salkeld observes, that an Act of Parliament was thought necessary to confirm the Marriages celebrated by Justices of Peace, during Oliver's Usurpation. *Vid.* 12 Car. 2. 35. And that the constant Form of plea Marriage is, That it was *per Presbyterum s. Ordinibus Constitutum*. *Salkeld's Reports* Now if the Issue of a Marriage, celebrated by a dissenting Teacher, should be intitled to the same Privileges as the Issue of a lawful Marriage, only because the Fault was not theirs, but the Parents; neither ought Bastards to be excluded for they are equally innocent, and so all spurious Issue in the Kingdom would be on the Level with those that are legitimate; as to the Woman's being the weaker Sex, therefore she ought to receive no Prejudice from the Marriage being perform'd in an undue Manner, (tho' her Husband shall) it may be difficult to instance in a Marriage where the Wife shall have an Interest in the Husband's Fortune and the Husband none in hers; for if it be a legal Marriage on one Side, one would be inclin'd to think it must be so on the other: the Act of 7 & 8 W. 3. cap. 35. before recited which lays such Penalties on those in Orders who shall celebrate Matrimony in a clandestine Manner, puts this Matter beyond Dispute unless the Legislature took it for granted, that the Privileges and Advantages attending Marriage in this Kingdom, could only be deriv'd from the marry'd Couple and their Issue, when the Ceremony is performed by one in Orders. Or why was the Penalty of 100 l. laid upon the Clergy only? And I am apt to believe the dissenting Teachers themselves never apprehended that Parliament intended them under any of the Denominations of Parson, Vicar or Curate.

ever look'd upon themselves as obnoxious to the 100 *l.* Penalty for marrying without Licence or Bans; nor would they thank their Friends for bringing them within the Danger of those Penalties.

C H A P. II.

The Nature of a Feme Covert. Wherein a Feme Covert and an Infant differ as to Privilege. What Acts the Husband may do to the Wife, and what the Wife to the Husband; and the Explication of the Rule, That they are one Person in Law. And in what Respects she is said to be sub potestate viri. Of the Change of her Name and Dignity.

The Nature of a Feme Covert.

COverture is *tegere* in Latin, and is so called 1 Inst. 112.
for that the Wife is *sub potestate viri*. The Law of Nature hath put her under the Obedience of her Husband, and hath submitted her Will to his, which the Law follows, *cui ipsa in vita sua contradicere non potuit*; and therefore will not bind her by her Acts joining with her Husband, because they are judged his Acts, and not hers; she wants Free-will, as Minors want Judgment; and yet the Law of the Land, for Necessity-sake, makes bold with this Law of Nature in a special kind, and therefore allows a Fine levied by the Husband and his Wife, because she is examined privately concerning her Free will, judicially by an authentical Person trusted by the Law, and by the King's Writ, and so taken in a sort as a sole Woman; as also when she comes in by Receipt.
Hob. 225.

Wherein a
Feme Covert
and an Infant
differ.

A Feme Covert in our Books is often compared to an Infant, both being Persons disabled in the Law, but they differ much; an Infant is capable of doing any Act for his own Advantage; so is not a Feme Covert. A Lease made by an Infant, without Rent, is not void, nor voidable; but it is void in the Case of a Feme Covert. If a Feme Covert enter into Bond, *non est Factum* may be pleaded to it; but if an Infant enter into Bond, he must plead the special Matter, That he was under Age. An Infant may bind himself for Conveniencies, Necessaries for himself and Family, and the Law giveth him Authority so to bind himself; but a Feme Covert cannot do so without Consent actual or implied of the Husband, because thereby she is to bind another that hath all the Property in her Estate, as was the Opinion of the Lord Chief Justice Hale in *Scott and Manby's Case*. And yet a Feme Covert is the Favourite of the Law, and therefore the Law gives her *rationabile Estoverium*, till Dower is assigned; And it is said in some of our Books, an Action lies not by the Executors against her for her *Paraphernalia*: But more of this *infra*.

2 Inst. 18.

What Acts the Husband may do to the Wife, and the Wife to the Husband, though they are but one Person in Law.

1 Inst. 112.

Baron and Feme are commonly said to be one Person in Law; the Consequents of which are, that a Man cannot grant Lands and Tenements to his Wife; and also if a joint Estate be made of Lands to Baron and Feme, and a third Person, in this Case the Husband and Wife shall have but a Moiety; and for this Reason also, if the Husband discontinues the Land

Chap. II. *are deemed one Person.*

Land of his Wife, and takes back an Estate to him and his Wife, the Wife is remitted, and so is the Husband, though he cannot say so; for he cannot be remitted but the Husband also must be remitted, for they are one Person in Law. *Vid. plus sub Titulo Moieties.* Cro. Eliz. 129.

Though Baron and Feme be but one Person in Law, so as neither of them can give any Estate or Interest to the other, yet if a Charter of Feoffment be made to the Wife, the Husband, as Attorney to the Feoffor, may make Livery to the Wife; so a Feme Covert that hath Power to sell Land by Will, may sell the same to her Husband, because they are but Instruments to others, and the Estate passeth from the Feoffor or Devisor. 1 Inst. 188.

Though our Law makes the Woman subject to the Husband, yet he may not kill her but it is Murder; he may not beat her, but she may pray the Peace, 1 Ed. 4. 1. but he may give her moderate Correction. *F. N. B.* So he may not starve her, but must provide Maintenance for her. Nay, so near is this Oneness of Husband and Wife respected in the Law, that if the Husband enter into Obligation for the Duress of his Wife, the Bond shall be void. *Writ de Securitate Pacis. Siderf. 123.*

A Wife, by the Law of God, is *sub potestate viri*, and her Name of Dignity is changed. It was a pretty Case of *Sherwood, Hill. 2 Car. 1. B. R.* In Trespass the Defendant justifies the taking by the Command of *J. Pots Armig'*, and Dame *Ursula* his Wife, and Exception was taken to it, because a Gentleman may not have a Lady to his Wife; and held a good Exception to the Writ. A Writ of Partition was brought against the Duke of *Suffolk* and his Wife, by *Ranulph Howard Esq;* and *Dominam Annam Powes uxorem ejus*, and Exception was taken, because she was

Dyer 29. b. was not named by the Name of her Husband and held a good Exception; but it was amended and made *ad respond. R. H. O' Anna uxori nuper uxori Dom' Powes defunct.*

Vide infra, of the Name of Nobility by lost or not by the Marriage.

C H A P. III.

Of Bastardy.

Of the Writ de Ventre inspiciendo. The Form of the Petition for such a Writ. The exact Time for the Birth of an Infant. Of the Sheriff's Proceedings in this Writ in the Case of a Widow, and in the Case of a Wife. In what Court the Child may choose his Father. Who shall be said to be a Bastard or not. Who shall be counted a Bastard, tho' born within Marriage. The Signification of Mulier in our Law. Of Bastardy, in what Court to be proved, and why an Ecclesiastical Court cannot proceed to the Trial of Bastardy before they receive Commandment out of the King's Court. The Credit of a Bishop's Certificate in such Case. Where the Trial of Bastardy shall be per Pais, and where by the Ordinary. The Difference between general Bastardy and special Bastardy, and where each is to be tried. Bastard by our Law, and Mulier by the Civil Law. Bastard by the Canon Law, and Mulier by the Common Law. What Divorce shall bastardize the Issue. Who only may write to the Bishop to certify Bastardy. Of Bastard eigne and Mulier puisne in case of Descent. How Estates may be limited to a Bastard by a reputed Name.

A Writ de Ventre inspiciendo.

THIS is the Writ for the searching of a Woman that saith she is with Child, and thereby with-holds Lands from him that is next Heir at Law. *Regist. 227. 1 Inst. f. 8.*

A Feme supposed to be enseint at her Husband's Death.

Nota, saith the Register, Quod si quis habens hereditatem, duxerit aliquam in uxorem, & postea moriatur sine hærede de corpore suo exeunte, per quod hæreditas illa fratri ipsius defuncti descendere debeat, & uxor illa dicit se esse pregnantem de ipso defuncto cum non sit, habet frater & hæres ejus breve de Ventre inspiciendo.

The Form of the Petition for such a Writ.

To the Right Honourable, &c. Lord Keeper of the Great Seal of England.

The humble Petition of *A. B.*

Sheweth,

“ That whereas *J. B.* being in his Life-time
 “ seised in his Demesne, as of Fee, of and in
 “ certain Lands, &c. in the County of *C.* late-
 “ ly died seised, having at the Time of his Death
 “ no Issue of his Body lawfully begotten. And
 “ whereas *E.* late Wife and Relict of *J. B.*
 “ since the Death of the said *J. B.* hath, and
 “ still doth pretend and give out in Speeches,
 “ that she is *impregnate* by the said *J. B.* to the
 “ Disherison of your said Petitioner, who is
 “ next Kinsman and Heir of the deceased *J. B.*
 “ and

“ and to whom the said Lands and Teneme
 “ by Right of Inheritance, do descend, the
 “ J. B. dying without Issue of his Body lawf
 “ begotten. And lest the said E. out of a Del
 “ to deprive your Petitioner of his Inheritar
 “ impose upon your Petitioner a supposititi
 “ Child, as Heir of the said J. B. deceased,
 “ claring the same to be born of her Body a
 “ the Death of the said J. B. to the Disheri
 “ of your Petitioner, against Equity and C
 “ science, &c.

“ May it please your Lordship to gra
 “ to your Petitioner his Majesty’s most g
 “ cious Writ *de Ventre inspiciendo* to
 “ Sheriff of, directed, returnable, &c.
 “ And your Petitioner shall ever pray, &

The Lord Chancellor ever grants a Day
the Wife, to shew Cause why such Writ m
not issue.

The Form of the Writ, *Vide Fitz. N. B.*

Bracton saith, If the Feme hath not an Infa
within forty Weeks after her Husband’s Deat
or if she be not found *enscipt*, she shall be p
nished by Imprisonment and Fine.

But if the Feme hath a Child within the for
Weeks, then such Infant shall have the Heritag
if the other Heir cannot prove the Infant to l
another’s, and not the Husband’s.

The exact Time for the Birth of an Infant.

It is held amongst Physicians, that by the Rule
of Nature, and their Observations in Physick
that the exact Time for the Birth of an Infan
is 280 Days from the Conception, *scil.* nin
Months and ten Days, accounting it *per Mensu*
solare.

Solares, that is, 30 Days to every Month: But it is natural also, if the Birth be at any Time within 10 Months (that is to say 40 Weeks) for 10 Months and 40 Weeks are all one.

An Infant was born forty Weeks and ten Days after the Death of the Husband, and was held to be legitimate: So it was adjudged in the Case of *Dr. Andrews*, who died of the Plague. 2 *Jac. B. R.* A Man dies 23 *March*, 8 *Jac.* his Wife *priviment enseint*, which was born 5 *January* after, which was by Computation forty Weeks and ten Days after the Death of the Husband; and the Physicians upon Conference he'd, That twenty Days backwards and twenty Days forwards doth not take away Legitimation, though forty Weeks is the *Tempus constitutum*. *Psalms*. 9. *Lit. Rep.* 178. and the Jury found the Issue legitimate.

But by Accident an Infant might be born after the forty Weeks, or before; and in the Case of *Dr. Andrews*, he died of the Plague, so that he was sick but one Day before his Death, and the Woman's Father-in-Law used her with great Inhumanity, and caused her to lie in the Streets several Nights; and she was in Travail six Weeks before she was delivered; and that she was delivered within twenty-four Hours after she was taken into the House and well used, which was a good Proof of Legitimation; tho' it was proved on the other Side, that she was a lewd Woman of her Body. And at the Trial of *Dr. Andrews's* Heir, *Dr. Chamberlain*, a Man-Midwife, informed the Court upon his Oath, that he had known a Woman to be delivered of one Child, and two Weeks after to be delivered of another: And *Dr. Paddy* and *Dr. Mom-* then affirmed, that the Birth is sooner or later,

later, according to the Nutriment the Mother had for it.

So in *Alsop's Case*; The Wife, after four Weeks and eight Days, was delivered of a Daughter: By the Doctors, It may be legitimate; for as well as *Antenatus* might be He a Child born at the End of seven Months, *Postnatus* actually born after forty Weeks; they held, a Child may be legitimate, tho' it be born the last Day of the tenth Month after Conception, accounting the Months *per Menses Solares*, not *Lunares*. *Godb.* 281. 1 *Roll.* 2 *Cro.* 571. *Alsop* and *Stacy*.

I shall only cite two Cases more on this *Ventre inspiciendo*; one was in the Case of a Widow, and the other in the Case of a F Covert.

Ventre inspiciendo in case of a Widow.

One was in the Time of Queen *Elizabeth*. *Francis Willoughby* died seised of a great Estate of Inheritance, having five Daughters, leaving *Dorothy* his Wife, who at the Time of his Death pretended herself to be with Child by Sir *Francis*; which if it were a Son, all the five Sisters would lose the Inheritance descended to them. They prayed a Writ *de Ventre inspiciendo* quod *Chancery*, directed to the Sheriff of *London*, he should cause the said *Dorothy* to be viewed by twelve Knights, and to be searched by twelve Women in the Presence of the two Knights, and *ad tractand. per ubera & ad tractand. inspiciend.* whether she was with Child and to certify the same into the Common Bench; and if she were with Child, to certify for how long Time in their Judgments, & *quando paritura*. Whereupon the Sheriff accordingly caused her to be searched, and returned, that it was twenty Weeks gone with Child, and

within twenty Weeks *fuit paritura*. Whereupon another Writ issued out of the Common Bench, commanding the Sheriff to keep her safely in such an House, and that every Day he would cause her to be viewed by some of the Women named in the Writ, (ten being named therein) and some to be present at the Delivery, and to view the Birth whether it were Male or Female; and the Sheriff returned, that such a Day she was delivered of a Daughter.

The other was in the Time of King James the First, and it was one *Thecar's Case*; and

In Case of a Wife.

the like Circumstances and Proceedings were in this Case, *Pasch. 22 Jac. 1.* with this Difference: The Lady *Willoughby's Case* was in the Case of a Widow, but this was in the Case of a Feme Covert, who was married within a Week after the Death of her first Husband, who is supposed to get the Child; for here she was a Feme Covert, and ought to cohabit with her Husband. They did not take such a Course as in the Lady *Willoughby's Case*, of taking her into the Sheriff's Custody, but left her with her Husband, he entering into a Recognizance, that she should not remove from the House wherein they inhabited, and that one or two of the Women might see her every Day, and two or three be present at her Travail; for it was said, that this Issue might well be said to be the Child of the first Husband, and should inherit the Land. And after this Course observed, she was delivered of a Female Child, who was afterwards, by Inquisition on Office, found to be the Daughter and Heir of the first Husband. *Cro. Jac. 685. and Litt. Rep.*

77. *Thecar's Case, Winch, p. 71.*

Note; It is said, in 1 *Inst. fol. 8. a.* if a Man with a Wife and dieth, and in a very short Time after the Wife marrieth again, and within nine Months

In what Case the Child may choose his own Father.

Months hath a Child, so that it may be Child of the one or the other; that in this the Child may choose his Father; *Quare, Casu Filiatio non potest probari.*

Who shall be said to be a Bastard or not.

In respect of the Months or Weeks after Decease of the Husband, *Vide sub Titulo Ventre inspiciendo* more fully.

By our Common Law, we term them all bastards which are born out of lawful Marriage.

If the Husband be within the four Seas (or within the Jurisdiction of the King of England) if the Wife hath Issue, no Proof is to be adduced to prove that Child a Bastard, (for in Case *Filiatio non potest probari*) unless the Husband hath an apparent Impossibility of Procreation, as if the Husband be but eight Years &c. But if Issue be born within a Month or Day after Marriage, between Parties of lawful Age, the Child is legitimate.

If the Husband be castrate, so that it is apparent he cannot in any Possibility get Issue, if the Wife hath Issue divers Years after, this shall be a Bastard, although he be begotten within Marriage, because it is apparent that it is not legitimate: In the *Star-Chamber*, 14 Jac. Done *Egerton versus Hinton and Starkey*; by the Lord Chancellor and *Montague*; but *Hobart contra*.

If a Woman be big with Child by *A.* after *A.* marries her, and the Issue is born within the Espousals, this is a *Mulier*, and a Bastard. (*Mulier* in our Law signifies *Uxor* & sic *filius natus vel filia nata ex justa uxore appellatur in legibus Angliæ filius mulieratus vel filia mulierata*)

If a Wife be big with Child by one, and another marries her, and after the Issue is born (though but three Days after) this is a Bastard, and no Bastard, because born within the Espousals.

If a Feme Covert hath Issue in Advowtry, yet the Husband be able to beget a Child, and be within the four Seas, it is not a Bastard. *Eger-Case.* So it is if a Woman elope, and live in Advowtry with another; but then the Husband must be within the four Seas, so as by Instrument he may come to his Wife.

The Rule that a Person shall not be bastardized after his Death, is meant only in the Case of *Bastard eigne* and *Mulier puisne*; i. e. such a Child as is born before the Marriage of his Father and Mother, who marry afterwards: But the Reason why the Spiritual Court cannot give Sentence to annul a Marriage after the Death of the Parties, is, because the Sentence is given on the *salute Animæ*, and then it is too late: But the Temporal Courts may take Cognisance of the Matter at any Time afterwards; as appears in the Case of *Pride* against the Earls of *Bath* and *Montague*. *Salkeld's Rep.* 120.

One may be proved a Bastard after his Death.

If one be beyond Sea during the whole Time his Wife's going with Child, that Child is a Bastard. *Salk. Rep.* 122.

Child begotten while the Husband is beyond Sea, a Bastard.

Where a Child is begotten after a Divorce *Mensa & thoro*, the Child is a Bastard, unless there be Proof of the Parties coming together; it shall not be presumed: But it is otherwise upon voluntary Separation. *Salk. Rep.* 123.

Child begotten after Divorce, a Bastard.

One married his first Wife's Sister, and was prosecuted in the Spiritual Court for an incestuous Marriage; and pending the Suit, the first Wife also died: And Sentence was afterwards given, declaring the Marriage to be void.

The Spiritual Court cannot decree a Marriage void after the Death of either Party.

Hereupon a Prohibition was prayed, and
 ed; for the Consequence of this Proc
 is to bastardize the Issue, which cannot
 the Spiritual Court after the Death of e
 the Parents. But it was held, that the su
 Party might be punished for Incest.
Rep. 182.

Bastardy.

In what Court to be proved.

If a Suit to prove a Bastardy and Leg
 be first commenced in the Ecclesiastical
 before any Question be moved of such
 in the Temporal Court of the King, a
 bition lies to restrain such Suit; and i
 accompanied with Practice and Fraud, t
 Misdemeanor punishable in the *Chancery*.
 the Reason why the Ecclesiastical Judge
 enquire of Legitimacy or Bastardy, bef
 hath received Direction or Commandme
 of the Temporal Court of the King, is, l
 the Court Christian never had Power to
 meddle with Temporal Inheritances *dir*
indirecte.

It hath been resolved, that where the
 on of Bastardy or Legitimacy hath been
 in the King's Temporal Courts, and Issue
 it be joined there, then it may be transf
 to the Ecclesiastical Court by the King's
 to be examined and tried there; and upo
 the Bishop ought to make a Certificate
 King's Court; which Certificate being m
 due Manner in Law, gives such Credit
 that all the World shall be estopped and
 by it.

But in an Action on the Case for calling
 Bastard, the Defendant justified that he

and; and it was awarded that this should be *per Pais*, and not by the Ordinary.

179. General Bastardy ought to be tried by the Ordinary, and not *per Pais*, 18 Ed. 4. 3. a. *Special Bastardy where triable. Special where.* Bastardy *per Pais*. When the Issue is joined in Bastardy, before it shall be awarded to the Ordinary to be tried, Proclamation shall be made of it in the same Court, and after the Issue shall be certified into Chancery, where Proclamation shall be made once a Month for three Months; and after the Chancellor shall certify to the Court where the Plea is depending; after it shall be proclaimed again in the same Court, That all those, whom this Plea doth concern, shall go to the Ordinary to make their Assignments. 10 H. 6. cap. 11.

The Wife of a Man who hath been beyond so long Time before the Birth of the Issue, that the Wife hath in his Absence, that the Child cannot be his Issue; this is a Bastard. *Hill. 1. in Camera Stellata, Done and Egerton.*

In Respect of Marriage unlawful.

A Man (having a Wife) takes another Wife, and hath Issue by her, living the first Wife, this is a Bastard, for the second Marriage is void. 7 Co. 44. *Kenn's Case.*

A Man marry his Cousin within the Degree, the Issue between them is no Bastard unless by Divorce; for the Marriage is not void. 26. 34. b. So it is if the Brother marry his Sister.

An Idiot *a nativitate*, may consent to Marriage, and his Issue shall be legitimate. *Trin. 3. Stile and West, B. R.*

Bastard by our Law, and Mulier by the Civil

By the Constitutions of the Pope, a B
born before the Espousals of the same Pa
who after intermarry, is legitimate: Yet
appears by the Statute of *Merton, cap 9.* the
refused to accept such Law in this Realm
answered to the Motion of it in Parlia
Nolumus Leges Anglia mutari.

If the Parents are divorced *causa consang*
tatis, they not having Notice of this at the
riage, the Issues had before are Bastards by
Law, and *Muliers* by the Civil Law.

**Bastard by the Spiritual Law, and Mulier
our Law.**

If a Man marry a Woman big with Chi
another, and within three Days after she
livered, in our Law this is a *Mulier*, and i
Spiritual Law a *Bastard*.

If a Woman elope and hath Issue in Ad
try, the Issue is a *Mulier* in our Law, a
the Spiritual Law a *Bastard*. 43 Ed. 3. 19

But if a Man who hath one Wife take
other, and hath Issue by her, this Issue is
stard by both Laws; for the second Marri
void.

D I V O R C E.

What Divorce shall bastardize the Issue,
Tit. Divorce.

At what Time the Divorce being made
bastardize the Issue, *vide Tit. Divorce*

Feo oye que il fuit agree que si un ad Iss
stard eign per un feme & puis la feme m

ap. III. *Of Bastardy.*

enter, & le Baron morust depuis la dit Feme
y a lui per que el ad le bastard & ad Issue
si fuz per lui & le Baron morust, que si en
casse le bastard enter en les terres de queux son
morust seise & ad Issue & morust, que ceo
quel descent que barrera le Mulier a claymer
ses terres, car le maxime tient lieu ou le
siage est prosecut & nemy ou un marriage
oveque un estranger. Ex Manuscrip.
Brownloe.

Bastardy, where triable.

General Bastardy, or *unq; accouple en Loyal*
trimony, is triable by the Bishop's Certificate;
Special Bastardy, as whether one was born
gotten before the Espousals; or whether a
man be a Man's Wife, or not; or whether
were married to another before; these Mat-
being specially alledged, and put in Issue, it
be tried *per Pais*. *Hard. 2. 63. Ashfield's*

Bastardy be pleaded in one, for that he
born of a second Wife, living the first, this
be tried *per Pais*; for the Marriage is void.
11. 24. adjudged.

Issue be, whether a *Bastard* or a *Mulier*,
all be tried by the Ordinary.

It if the Issue be, whether a *Bastard*, or born
in the Espousals, it shall be tried *per Pais*
4. 8.

It if the Issue be, whether born before Mar-
riage, it shall be tried *per Pais*, for this lies well
in the Conscience of the Country. 11 H. 4. 84.

It if an Issue against an Infant, if Bastardy be
pleaded in the Infant, this shall not be tried by
the Ordinary, but *per Pais*; because the Infant
is not compellable to take Issue upon it; for then

he would lose the Advantage of the Inquiry in these Circumstances, and so no Issue shall be joined upon this; and if Issue be not joined between the Parties, the Ordinary shall not try it. *Ass. 45.*

If Bastardy be pleaded in Abatement of Writ, and the other saith he is a *Mulier*, shall be tried *per Pais*, because it is not perjury. 49 *Ass. 45.*

Who only may write to the Bishop to certify Bastardy.

Note; None but the King's Courts of Record, as the Court of King's Bench, Common Pleas, Justices of Gaol-delivery, and such like, may write to the Bishop to certify Bastardy, Fidelity, Loyalty of Matrimony, and such like ecclesiastical Matters; for it is a Rule in Law, *That none but the King can write to the Bishop to certify;* and therefore no inferior Court, as the Court of Chancery, Durham, Norwich, York, can write to the Bishop to certify; and therefore in such Cases the Plea ought to be removed *in Banco*, and this Court ought to send the Plea to the Bishop, and after to remand it. *1 Inst. 134.*

In Assize, if the Tenant saith, that *A.* the Plaintiff, took *B.* to Wife, and she bore him an Issue the Plaintiff, and after they were divorced, and so the Plaintiff a Bastard; to which Plea the Plaintiff saith, that he is a *Mulier*; upon which a Writ is directed to the Bishop, who is to certify that the Plaintiff was born in *Loyal Matrimony*, without fully certifying that he is fully a *Mulier*; and although the Tenant had acknowledged in his Plea, that there was a *Mulier*, and that the Plaintiff was born in it; yet because if there were a Divorce, then this

lawful Marriage, the Certificate aforesaid is good, which certifies that he was born in law-Marriage. 43 Aff. 43.

Upon Issue of Bastard or not, if the Ordinary certify that the Plaintiff was a *Mulier* *per Inquisitionem invenit*; this is good, without certifying generally *Legitimus*. 3 H. 6. *Bastardy* 2.

If a Writ issues to the Bishop to certify if J. S. is a Bastard, if he make a Certificate, yet if he does not remand the Writ which comes to him without the Certificate, it is not good. 41 Aff. adjudged.

If a Writ issue to the Archbishop, Gardein of Spiritualties *sede vacante* of the Bishoprick of Coventry and Lichfield, to certify whether A. ever accouple *en loyal*, &c. and he returns, Dr. Babington, his Commissary of Coventry and Lichfield, had enquired, &c. this is not a Return, because *delegata potestas non potest delegari*; but the Return ought to have been in the Name of the Archbishop himself. 7 Jac. Foliam's Case.

If between Strangers another be tried a Bastard *per Pais*, this shall not bind him that is so tried, because he is a Stranger to the Trial, and cannot have an Attaint. *Doct. and Stud.* 6.

If a Man be certified a Bastard by the Ordinary in an Action personal, he shall be bound perpetually, as well as in Actions real. 19 H. 6. 6.

If the Defendant be certified a Bastard by the Ordinary, yet the Certificate after shall lose its force, if the Plaintiff be afterwards nonsuited, then the Certificate is not of Record. 18 Ed.

Of Bastard eigne and Mulier puisne in Case of
Descents.

A Man seised of Lands in Fee, and hath a Bastard eigne and Mulier puisne, and dies; the Bastard enters, and the Mulier dies, his Heir priviment enseint with a Son, and the Bastard hath Issue and dies seised, the Son is born, Right is bound for ever; but if the Bastard seised, his Wife enseint with a Son, the Mulier enters, the Son is born, the Issue of the Bastard is barred; for there must be not one dying seised, but a Descent to his Issue.

Note, That the Case of Bastard eigne and Mulier puisne differs from the common Case of Descents and Bars; for Descents do only toll the Entry of him that Right hath, but leaveth it to his Action: But now if a Man seised of Lands in Fee hath Issue two Sons, Bastard eigne and Mulier puisne, and the Father dies, the Bastard enters, claiming as Heir to his Father, and occupieth the Land all his Life, without any remedy made upon him by the Mulier, and the Bastard hath Issue, and dies seised, and the Land descends to his Issue, who entereth; in this Case the Mulier is barred for ever, both of Entry and of his Action; for the Issue of the Bastard is become, in Judgment of Law, as a full Heir: For it is the ancient Law, *Justum est aliquem post mortem facere Bastardum, toto tempore vite sue pro legitimo habebat*. 1 Inst. 224. 8 Co. Lechford's Case.

How Estates may be limited to a Bastard by a reputed Name, or not.

If a Remainder is limited to J. S. Son of W. although he be a mere Bastard, and no *Mulier* by the Spiritual Law, yet if he be reputed for his Son, it is a good Remainder: But if an Estate for Life be made, the Remainder to the Issue of the Body of J. S. or of him begotten on the Body of A. S. if he hath afterwards illegitimate Issue, yet this Issue shall never take this Remainder, because he cannot have the Reputation of Issue before his Birth. 1 *Inst.* 3. 6.

If A. makes a Feoffment in Fee to the Use of himself for Life, the Remainder to the Issue Male of one Mary Lloyd, of her Body begotten by A. the Feoffor, whether he be lawfully begotten or not, so that he be the reputed Son of A. it is sufficient for him to intitle himself, to say, that he is the Son of the said A. begotten on the Body of the said Mary Lloyd, and that he is so reputed in the common Reputation of the Country, although he was not born nor in *esse* at the Time of the Remainder granted: And although there are lawful Issues between them which are *visne* to the Bastard; for the Person who is to take, is certainly described; for the Bastard of a Woman is certainly known to be her Issue; and this is limited to the eldest Issue. *Mich.* 38 & 39 *Eliz.* *Blodwel* and *Edwards*.

But though a Bastard be a reputed Son, yet he is not such a Son, in Consideration whereof an Use can be raised, because in Judgment of Law he is *nullius Filius*. 1 *Inst.* 123. a.

By a Devise of all his Goods to his Children, a Bastard eigne shall take a Portion. *Moor*, f. 10.

Note;

Note ; An English Merchant living beyond Sea hath Issue a Son by a Woman of the Country, who is an Alien ; although by the Civil Law Partus sequitur ventrem, yet it is not so in our Law, for the Child shall be of the Father's Condition ; for the Woman was sub potestate viri, quasi under the Allegiance of our King.

C H A P. IV.

Queen.

How the Queen is an exempt Person from the King in our Law. She is not to find Sureties, nor to be amerced. She is to be sued by Præcipe, not by Petition. She may inform by her Attorney in Chancery. Queen Consort or Queen Dowager, in Case of Treason, how she is to be tried. The Penalty for any to marry the Queen Dowager without the King's Licence. She is not restrained by the Statute of 1 H. 4 cap. 6. She and her Tenants not to pay Toll.

THough the Queen be a Feme Covert and a Subject, yet hath she a Prerogative as she is the King's Wife.

The Wife of the King of England is an exempt Person from the King, and is capable of Lands or Tenements of the Gift of the King, &c. and may sue and be sued without the King, as a Feme Sole.

That the Queen, as Feme Sole, may give and take solely without the King, appeareth by an ancient Charter long before the Conquest.

“ I *Ethelswith* Queen of the *Mercians*, with
 “ Consent of my Eldermen, will give by
 “ Grant to *Cawolf*, my most faithful Ser-
 “ vant, a certain Piece of Land, being Part
 “ of my peculiar Power, &c. that he may
 “ have and possess at his Pleasure as long
 “ as he lives; and after his End and Limit
 “ of his Days, he may leave it to whom-
 “ soever he will for everlasting Power and
 “ perpetual Inheritance. And we charge
 “ all secular Powers in the Name of God
 “ the Father, Son, and Holy Ghost, to ob-
 “ serve the aforesaid inviolably. These
 “ Witnesses subscribing and consenting
 “ thereunto, I *Etheldred* King of the
 “ *West Saxons*, and *Burghred* King of
 “ the *Mercians*.”

When the Queen sueth any Writ, the Writ
 shall not say, *If the Queen of England shall se-
 cure thee, &c.* for she ought not to find Sureties,
 as a common Person ought to do; for she shall
 not be amerced. *Vid. Fitz. B. de parco facto.*

A Protection may be allowed against the
 Queen, but not against the King; neither shall
 the Queen be sued by a Petition, but by a
Præcipe.

The Queen may inform by her Attorney in
 the Chancery by *English* Bill, to have a Decree
 made in the Court of the Queen confirmed;
 for though the Queen be a Subject, yet hath she
 a Prerogative with the King, as she is his Wife.

Queen Consort, or Queen Dowager, in Case
 of Treason, shall be tried *per pares*, as Queen
Anne, Wife of King *Henry* the Eighth, was,
Pasch. 22 H. 8. in the *Tower of London*, before
 the Duke of *Norfolk*, then High Steward.

Plenary

Chap. IV. *Of the Queen Consort, &c.*

Plenary by six Months against the Queen, a good Plea; albeit she claims the Advowson of the King's Endowment. 2 *Inst.* 361.

At a Parliament held 6 *H. 6.* it is enacted That no Man shall contract or marry himself to any Queen of *England*, without a special Licence or Assent of the King, on Pain to lose all his Goods and Lands. 2 *Inst.* 18.

If a Queen Dowager marry any of the Nobility, or under that Degree, yet loseth not her Dignity; as *Katharine*, Queen Dowager of *England*, married *Owen ap Meredith ap Theodore*, Esq; and yet she, by the Name of *Katharine* Queen of *England*, maintained an Action of *Detinue* against the Bishop of *Carlisle*. 2 *Inst.* 50.

The Queen shall find no Pledges, for she shall not be amerced.

The Queen is not restrained by the Statute of 1 *H. 4. cap. 6.* concerning Grants by the King. 1 *Inst.* 135.

In the Case of a *Quare Impedit* brought by her, Plenary is no Plea, *Quare*,

The Queen shall pay no Toll.

If the Queen's Tenant alien any Part of the Tenancy to one, and another Part to another, the Queen may distrain any one Part for the Whole, as the King may do; but other Lords shall distrain *pro rata*.

C H A P. V.

Privileges of a Feme Covert.

No Mortuary to be paid at her Death. She is not within the Statute of W. 2. cap. 25. What Conditions in Law shall bind the Wife, or not. She may not be a Constable, though the Custom be to elect by Houses. Lapse shall incur against her. Laches not to be accounted against her for not Entry or Claim to avoid Descent. What Privilege the Wife shall have in Suits, by Reason of the Husband's Privilege.

IF a Feme Covert dies, no Mortuary shall be paid; but if a Woman survive her Husband, and live in an House for a Year sole, with the Government of a Family, and after dies, she shall pay a Mortuary, *Linwood f. 7.* This was ordained by the Constitution of *Simon Langhan.*

The Statute of *W. 2. cap. 25.* a Feme Covert and Infant are not within this Statute, to have corporal Imprisonment by Punishment by their Plea, by vouching a Record, and failing of it. *1 Inst. 414.*

What Conditions in Law shall bind a Feme Covert, or not.

If Conditions in Law founded upon Skill and Confidence, as Offices of Parkship or Stewardship in Fee, &c. descend to a Feme Covert, if the Condition in Law annexed to them be broken, this shall bar her for ever: But if Feme Covert be Lessee *pur vie*, or Tenant in Dower, and her Husband makes a Feoffment in Fee, and the Lessor enters for the Forfeiture, as he
I may,

Privileges of a Feme Covert. Chap.

may, yet the Feme, after her Husband's Death may enter ; for this is a Condition in Law without any Skill or Confidence annexed to the Estate. 8 Co. 44. *Wittingham's Case*.

Women in Prison by reason of their Pregnancy, have been released upon Bail. *Cro. Jac.* 350.

She is punishable upon a *Malefactoribus Parcis*. *Hob.* 95, 97.

She is imprisonable for Force. *Hob.* 97.

She is punishable within the Statute of 1 Eliz. for hearing Mass, and within 23 Eliz. for not coming to Church.

A Woman (though the Custom be to elect her to Houses) may not be a Constable. *Cro. Car.* 381. *Prouse's Case*.

But Lapse shall incur against a Feme Covert if she doth not present within six Months.

Regularly no Laches shall be accounted to Infants, or Feme Coverts, for not Entry or Claim to avoid Descents ; yet Laches shall be accounted to them for Non-performance of a Condition annexed to the Estate of the Land ; for a Feme be enfeoffed, either before or after Marriage, reserving a Rent, and for Default of Payment a Re-entry, in this Case the Laches of the Husband shall disherit the Wife for ever. 1 *Inf.* 246. b.

Privileges in Suits.

If the Husband have Privilege in Chancery it shall not serve for his Wife. *P. C.* Clerk of the Crown in Chancery, and his Wife, as Executrix to her first Husband, were impleaded in *Banco* ; he brought a Writ of Privilege for himself and his Wife ; & *non allocatur* ; but she is not impleadable there, nor her Attendance requisite.

Wha

What Privileges the Wife shall have, by reason of her Husband's Privilege in Actions.

. brought Debt against Sir Simon Fanshaw his Wife, as Executrix of another, and sued the *Exigent*; and at the Return of the *Exigent*, the Defendant, Sir Simon, came into the Court voluntarily and prayed his Privilege, because he was an Officer of the Exchequer; & *Curiam*, The Defendant shall not have Privilege, because the Action was brought against him and his Wife *en auter droit*. Rolle, in his Argument of this Case, took these Differences.

Where the Defendants are coming to make *Diversities* Appearance and are arrested, as in 22 H. 6. and where they are sued in one Court, and the Husband demands his Privilege, because he is an Officer in another, as in this Case.

Where he is Defendant, and where he is Plaintiff.

Where he is sued in his own Right, and where he is in the Right of another, as in this Case. In the first of these Differences he shall have his Privilege, in the latter not. *Quare*, If the Defendant had not surceased his Time in this Case, would he demand his Privilege at the *Exigent*, or not before? *March, Rep. 149. Leven and Simon Fanshaw's Case.*

T. P. a Clerk in Chancery, married a Feme, who was Executrix to her Husband, Debt was brought against them in C. B. T. P. brings a Writ of Privilege to have the Action removed to Chancery; the Writ was disallowed by the Court, and the Defendant ruled to answer over, because the Wife was joined in the Action with the

the Husband; *aliter*, where the Wife come Aid of her Husband to follow the Suit. G p. 10. *Dyer* 377. *Pole's Case*.

If the Husband be solely impleaded in *Ba* and he comes with his Wife to the Court to send the Suit, and both are arrested, there shall have Privilege.

CHAP. VI.

Who shall be said to be Baron and Femé, & what Cases Marriage shall be said to be v or not. 1. *In respect of Age: Of the Time Agreement or Disagreement to the Marriage. What shall amount to such Agreement or disagreement.* 2. *In respect of Affinity or Consanguinity. What Marriages are within Levitical Degrees or not; with several more Cases of Precontracts.*

In respect of {
Age.
Consanguinity.
Divorce.
Profession.

1. **A**GE. In former Times, the Marriage Ward made a considerable Title in Books. I remember *Bracton*, lib. 2. f. 88. 1 A Woman being *Heir sine dispositione & ass Dominorum hereditatem habens maritari non test*; but now the Law is altered, and there I shall not trouble the Reader with it; only me observe, that in case the Lord disparage the Ward in Marriage under fourteen, that the lost the Wardship. Now there were four Cases of Disparagement then look'd upon.

i. *Pr*

1. *Propter vitium Animi*, as Ideot.
 2. *Propter vitium Sanguinis*, as 1. A *Villensis*.
 A *Burgensis*, i. e. a Mechanick, Haberdasher,
 Cooper, &c. 3. The Son or Daughter of a Per-
 attainted of Treason or Felony, albeit par-
 doned, for the Blood is corrupted. 4. A Ba-
 rd. 5. An Alien, or Child of an Alien.
 3. *Propter vitium Corporis*, as 1. *De membris*,
 missing one Hand, one Foot, one Eye, &c. 2. A
 deformity, as, to squint, be lame, crooked, &c.
 Privation, as blind, deaf, dumb, &c. 4. Hor-
 rid Diseases, as Leprosy, Palsy, &c. 5. Natural
 impotency to have Children. 6. Deflowered.
 4. *Propter jacturam Privilegii*; as to marry
 an Heir to a Widow, whereby he should, by
 reason of the Bigamy, have lost the Benefit of
 Clergy; but that Bigamy is ousted by the
 Statute of 1 Ed. 6. cap. 12.

*The Time of the Agreement or Disagreement to
 the Marriage, when they marry infra annos
 nubiles.*

*The Time of Agreement or Disagreement for
 a Woman, is at Twelve or after; and for the
 Man, at Fourteen or after; and there needs be
 no new Marriage if they so agree; but disagree
 they cannot, before the said Ages; but then
 they may disagree, and marry themselves to
 others, without any Divorce; and if once they
 have Consent, they can never disagree after.*
 79. 2 Co. 16.

*If a Man at Fourteen marry a Woman at the
 Age of Ten, at her Age of Twelve he may dis-
 agree, as well as she may, tho' he were of the
 Age of Consent; because in Contracts of Ma-
 riage both must be bound, or equal Election
 or Disagreement given to both: So it is e con-*

D

verso,

verso, if the Woman be of the Age of C and the Man under.

What amounts to a Disagreement.

If a Man marry a Woman, who is with Age of twelve Years, and after the W agrees to the Marriage within the Age of Years also; and after the Age of twelve marries with another; now the first M is absolutely defeated, so that he may take another Wife; for although the Disagreement within the Age of Consent was not satisfied yet the taking another Husband after the Age of Consent affirms the Disagreement, the Marriage is void *ab initio*, as it was judged in *Babington's Case*. But if a Man marry a Woman within the Age of twelve and after the Wife at eleven Years of Age agrees to the Marriage, and after the Husband takes another Wife and had Issue by her, this is a Bastard; for the first continues notwithstanding the Disagreement of the Woman she may not disagree within the Age of Years, and so her Disagreement was void. *Roll. Abr. 341.*

A Feme marries with J. S. and with Age of twelve Years disagrees, and marries another, the second Marriage resolved good; for the Church providing against Change of Lust, prohibits Divorces; but under the Age of twelve Years, is no such Mischief. *Per Noy, Banister's Case Dyer 17. in Margine.* And by him Marriage by Durels is good, against the Opinion of *wick, Palmer 32.* otherwise, by such tions, Divorces would be frequent to satisfy Lusts of Men.

If a Man within the Age of Fourteen marry a Wife of Twelve, or more, this is a Marriage and they are Baron and Feme *de facto*;

The Husband may have *Trespafs de muliere abducta cum bonis viri*. *Trin. 12. Jac. B. R. Bradshaw and Fletcher*. And if the Man come to fourteen, and make any Continuance of the Affection, this shall be a good Agreement to the Marriage, so as it afterwards shall not be dissolved.

If Disagreement be before the Ordinary, then they can never after agree to make it a good Marriage, though within the Age of Consent. *Quare*.

Debt on Obligation by Baron and Feme; the Defendant pleads the Wife had another Husband in full Life. The Plaintiff replies, that the time *ad annos nubiles* disagreed. The Defendant demurs. The Question was, If he ought to agree or disagree before *annos nubiles*? *Per Popham*, If she marry another Husband *infra annos nubiles*, this shall be a Disagreement. But it was adjudged *pro Quer.* because Cohabitation was with the second Husband all the Time after the Years of Consent. *Moor 575. Warner & sa Feme against Babington*.

It was a Question, if the Death of the Baron, before the Years of Consent of the Wife, both defeat the Marriage *ab initio*, as Disagreement shall do, or had dissolved it without Disaffirmance? And *per Curiam*, It hath dissolved and disaffirmed it; for the Baron dying, there is not any Marriage; and *Sponsalia* may be before the Years of Assent, but not Matrimony. *Moor 742. Sir Arthur George*.

*What Marriages are within Levitical Degrees
or not.*

IN the Statutes of 25 H. 8. cap. 22. and 2 H. 8. cap. 7. the Degrees prohibited in the 18th of *Leviticus* are truly set down; and not only Degrees of Kindred and Consanguinity but Degrees of Affinity and Alliance are set down, and may be best illustrated and viewed in this Scheme.

Of the Man's Part.

Degrees of Consanguinity prohibited, or a Man
may not marry

his Father's Sister. | his Mother. | his Mother's Sister

||

his Sister.

||

his Daughter.

||

the Daughter of his Son or Daughter.

Of the Woman's Part.

Degrees of Consanguinity, or a Woman may
not marry

her Father's Brother. | her Father. | her Mother's Brother

||

her Brother.

||

her Son.

||

the Son of her Son or Daughter.

On the Man's Part.

Degrees of Affinity prohibited, or a Man may not marry

Uncle's Wife, | Father's Wife. | Father's Wife's Daughter.

|| his Brother's Wife. || his Wife's Sister.

his Son's Wife, or Wife's Daughter.

|| the Daughter of his Wife's Son or Daughter.

On the Woman's Part.

Degrees of Alliance prohibited, or a Woman may not marry

her Aunt's Husband. || her Mother's Husband.

|| her Sister's Husband. || her Husband's Brother.

her Daughter's Husband.

|| the Son of her Husband's Son or Daughter.

The Act of 13 H. 8. provides for two Things: The first was against the Dissolution of Marriages consummate with bodily Knowledge, upon Presence of Precontracts; the other by Reason of other Prohibitions to marry than God's Law requireth: But that Clause about Precontracts is repealed, 2 E. 6. cap. 23. 1 Eliz. cap. 1. Stat. 15 H. 8. cap. 22. 18 H. 8. cap. 7 & 16. 32 H. 8. cap. 38. are the Statutes which concern Marriage within *Levitical* Degrees.

Marriages between Cousin-Germans, and all Marriages onwards between Cousin-Germans are by the Statute of 32 H. 8. cap. 38. made lawful.

All Marriages are lawful which are not prohibited within the *Levitical* Degrees.

Harrison married his Grandfather's Brother's Wife by the Mother's Side; this was held lawful by the Judges. *Vaughan's Rep. &c. Harrison and Burwel*, where you may read excellent Learning about the Common Law's Consuance as to Marriages, and of the Construction of the *Levitical* Degrees. *Vide 2 Ventris 9.*

Regula.

Qua eandem habent rationem propinquitatis cum eis qua nominatim prohibentur: And therefore, tho' the Marriage of the Nephew *cum amita & matertera* is forbidden by the said 18th Chapter of *Leviticus*, and yet the Marriage of the Uncle with the Niece is not by express Words prohibited, yet the same is prohibited.

So *Cro. Eliz. 298. Mann's Case*. *Mann* had married his Wife's Sister's Daughter, for which he was sued before the High Commissioners for tho' this was not expressly forbidden by the *Levitical* Degrees, yet because Degrees more remote are forbidden, they gave Sentence of Divorce; and he grounded his Prohibition on the Statute of 32 H. 8. cap. 38. and a Consultation was granted, because the Prohibition is not to be, if it be within the *Levitical* Degrees; and here it was general, and therefore not good.

In *Siderfin*, p. 434. *Mich. 21 Car. 2. B. M. Heyward* and his Wife against *Horn*.

It was moved for a Prohibition to the Spiritual Court; and the Suggestion was, that they proceeded there to excommunicate the Plaintiffs, because the Plaintiff *H.* had espoused the other

er Plaintiff, who was his last Wife's Sister's
daughter ; and it was granted. *Vid. Moor* 907.
Keilw. 551.

Grotius de Jure Belli, lib. 2. f. 137. sect. 12,
distinguisheth well, that lineal Parents are
prohibited, not collateral ascending or de-
scending ; and to this the Court inclined.

The Plaintiff sued one in the Ecclesiastical
Court for marrying his Sister's Daughter, and
the Defendant prayed a Prohibition, because out
the *Levitical* Degrees ; but it was denied,
because it is a Cause of Ecclesiastical Conusance.
Sym. 464.

If a Man marry his Mother or Sister, they are
husband and Wife until a Divorce.

But if a Wife take a second Husband, living
the first Husband, this Marriage is void by our
Law, as by the Spiritual Law, *contra* 9 H. 6. 14.

One had married the Widow of his Brother's
Wife, and the High Commissioners adjudged it
lawful : But *per Curiam*, This Marriage is lawful,
Stat. 32 H. 8. and 28 H. 8. And this Mar-
riage, being within the *Levitical* Degrees, shall
be determined by the Common Law ; and so
the Judges have taken upon them the Exposi-
tion of the *Levitical* Degrees, by Force of the
Statute of 32 H. 8. as appears by *Person's Case*
remembered in *Coke's New Entries.* *Litt. Rep.*
6. *William's Case.*

*Whether Mar-
riage be with-
in the Leviti-
cal Degrees,
determinable
by the Com-
mon Law.*

Prohibition was denied to the Ecclesiastical
Court, in Suit there to dissolve an incestuous
Marriage of his Brother's Daughter. *Sir Thomas*
Wentworth 191. *Margatride's Case.* Though the
Suggestion was, that Land settled on the said
Marriage should be drawn into Question in the
Spiritual Court ; but no Prohibition was granted
Collet's Case ; for upon such Pretence, incestu-

ous Marriage may be shelter'd ; and this l
lies properly in the Spiritual Jurisdiction.
Case was, *Collet's* Wife was the Sister of h
mer Wife, now dead ; but upon Informa
the Court, that the Suit in the Spiritual
was only a Contrivance of *Collet* to gain
Power to dispose of the Estate ; and *Colle*
Father, at first Instance had confessed the
Marriage, and the Spiritual Court was rea
give Sentence for the Divorce upon his C
sion without farther Evidence : The Cour
posed there should be a Trial at Common
upon a feigned Action, wherein the Issue
be, Whether ever *Collet* was married to the
of his Wife ? Which being refused, Day
given to shew Cause why the Prohibition
not be granted, and Proceedings to be stay
the *Interim*, and so from Term to Term.
Thomas Jones's Rep. 213. *Collet's Case*.

Persons pre-
contracted, or
under perpetu
al Impotence,
prohibited to
marry.

Marrying a
Brother's Wife
or Wife's Si-
ster, not probi-
bited by the
Levitical
Law, but by
Stat.

Altho' by the Stat. 32 H. 8. cap. 31. al
sons are allowed to marry that are withou
Levitical Degrees ; yet Persons precontra
or under a perpetual Impotence, are prohi
to marry. 2 *Vent.* 15. And to marry his Brot
Wife, or the Wife's Sister, is prohibited b
Statute, and not by the *Levitical Law*. 2
17. The marrying a Man's Wife's Sister wa
bidden only during the Wife's Life by the
saical Law ; for the Words of the Text, 18 L
y. 18. are, *Neither shalt thou take to Wif*
Sister to vex her, to uncover her Nakednes
sides the other in her Life-time ; for Polyg
with non-prohibited Persons was allowed
Jews.

Marriages in
the ascending
and descending
Line prohibited,
without Limit.

Marriages in the ascending and descen
Lines, are prohibited without Limit, but no
between Collaterals. 2 *Vent.* 18.

The Ecclesiastical Courts may take Consens and punish Persons marrying within the *Le- Courts of Com- mon Law de- termine what is within the Levitical De- grees, not the Spiritual Court.* *Levitical* Degrees and what not; and accordingly the Judges will grant a Prohibition to the Ecclesiastical Courts, where a Marriage is alleged to be without the *Levitical* Degrees.

ent. 15, 22.

as to Divorce, declaring the Marriage to be
, *Vide infra* Tit. Divorce.

as to Profession, that is, when one is regular profess under certain Rules, as to become of the four Orders of Friars, or a Monk, or a Nun; it was held in our Books, if a Deacon or Priest take a Wife, the Marriage was not void, but voidable by Divorce: if a Man marries a Nun, or a Monk marries another Woman, the Marriage, is void, the Issues are Bastards, because they were Persons in Law, and are under a Vow of Chastity. 1 *Inst.* 138. 12 *Co.* 8.

as to an Idiot contract Matrimony, this is good and shall bind him, as was judged in *Style* and *Sty's Case*, 3 *Jac.* 1. cited in *Siderf.* *Scot* and *Sty's Case* 112.

Precontract.

In Construction of the Civil Law the Wife is taken before the Espousals by Contract; for if they have Carnal Copulation after Contract, they are not be punished for Adultery or Fornication, but only for Contempt against an Edict of the Church, which hath prohibited carnal Copulation before the Espousals solemnized *in facie Ecclesie*. If a Legacy be given to a Woman *uxor fuerit*, and she contract her self, she may demand the Legacy in the Spiritual Court, before the Espousals celebrated. *Moor* 170. in *Sty's Case*.
C H A P.

C H A P. VII.

Trial of Marriage.

Where and in what Cases Trial of Marriage shall be by the Bishop's Certificate, and where in Part Of the Issue n'unique accouple en loyal matrimony, where to be tried. If the Issue whether she be a Feme Covert or Feme Sole where to be tried, and the Reason of the Difference. The Diversity between a Marriage in Right and a Marriage in Possession or Facto; and the Consequence of the Diversity. The Day and Place is omitted in the Bishop's Certificate, if good. The Form of the Bishop's Certificate. The Credit the Law gives to it.

Matrimonial Causes are of Spiritual Cognizance, as the Right of Marriage, *N'unique accouple en loyal Matrimony*, Divorces. 4 *Bunting's Case*, 7 Co. 44. And so Bastardy general, but not the Consequents or Appurtenants of Marriage, as the Age of Consent shall be tried at Common Law. So it is said 48 E. 18. All Matters of Marriage are not matrimonial, so as to appertain to the Spiritual Court. And *Fitzh. N. B. 644. a.* takes a Difference between Actions for Money given in Marriage and given by reason of the Marriage. In the last Case the Spiritual Court shall not have Cognizance, though in the first Case it shall; because it is not Matter merely occasioning Marriage, but as Reward of it. *Sid. 115.*

Where, and in what Cases, Trial shall be by the Bishop's Certificate, or in Pais, or not.

The Right of Espousals is evermore triable by the Bishop's Certificate; as if the Issue be *accouplé en loyal matrimony* or not; this is triable by the Bishop, and not *per Pais*. 7 H. 4. 25. H. 6. 18, So if such Issue be in a Writ of *aver*, it shall be tried by the Bishop; so in *appeal*: But whether a Woman be a Feme *covert*, or sole, is always triable *per Pais*: So the Issue be Wife or not Wife, married or unmarried, it is triable *per Pais*. 7 H. 4. 25.

If a Feme and her Husband bring *Trespas*, the *son Feme* shall be tried *per Pais*: So if the *covert* bring *Affize*, as a Feme sole, if the Tenant saith, she is a Feme *covert*, it shall be tried by the *Affize*. In *Affize* by Baron and Tenant the Tenant saith, that the Wife is the wife of a Stranger. The Demandant saith, the Marriage between them was within the Year of Consent, and after at twenty Years of Time he took him to Husband, & *issint sa Feme*, she is not the Wife of a Stranger; this shall be tried *per Pais*. 49 Ed. 3. 17. b. *Isabel Goodcheap's*

In Debt the Defendant pleaded *ne unques accouplé en Loyal Matrimony*; whereupon the Plaintiff demurred; and it was held to be an ill Plea, because it puts the Matter upon Trial upon the Bishop's Certificate; but the Plaintiff might have pleaded no Marriage in Fact, for that would have been tried *per Pais*. Judgment *pro Quer.* *Cur's Rep.* 50.

In a *Cui in vita*, if the Issue be whether the Defendant were her Husband, it shall be tried *per Pais*

Pais, for the Action lies, if he were her Husband *in fact*.

In a Writ by *W. C.* and *M.* his Wife; if Issue be whether she were the Wife of *W. C.* Abatement of the Writ, this shall be tried *per Pais*. 39 E. 3. 16.

Whether a Marriage be solemnized shall be tried *per Pais*.

In a Writ of Covenant to assure certain Land within twenty Days after the Marriage solemnized between *A.* and *B.* If the Issue be whether there were any such Marriage solemnized or not, this shall be tried *per Pais*, and not the Ordinary. *Mich. 4 Jac. B. R. Fletcher & Muffet.*

If *A.* Covenant with *B.* that if *B.* marry with the Daughter of *A.* *rite & legitime secundum leges Ecclesiasticas*, he will assure to *B.* a Copyhold Estate. *B.* brought his Action of Covenant, and alledgeth that he *rite & legitime* espoused the Daughter of *A.* upon which Issue was joined and found for the Plaintiff. Exception was taken, because it ought to be tried by Certificate and not *per Pais*; *Sed non allocatur*; for the Marriage is only in Issue, and that is the Substance, and not whether he were lawfully espoused; for the Legitimation doth not come in Question; and it was held sufficient for the Plaintiff to alledge a *licet sapius requisitus* without giving Notice of the Marriage; for he ought to take Notice at his Peril. *Cro. Jac. 102. Fletcher and Pynset.*

Whether Coverture, or sole, shall be tried *per Pais*; but accouple en loyal matrimony by the Bishop, and the Reason of the Diversity.

If the Issue be whether the Church is void or not void, this shall be tried *per Pais*; but whether a Church be full or not, shall be tried by Certificate; so if the Issue be whether such a Woman be covert or sole, this shall be tried *per Pais*; though the Issue whether such a Woman was accouple en loyal matrimony shall be tried by Certificate; and the Reason of the Diversity.

ty in both Cases, is this; Voidance or not
 dence, a Coverture or Sole, are Things no-
 ous to the Country, and distinguishable by
 ; but Plenarty and loyal Matrimony are
 Things within their Cognizance: For though
 man lie with a Man as her Husband, yet
 Country cannot judge whether they are law-
 married or not. *Sid. p. 39. in Watson and*
's Case.

is Ventris 77. If Issue be, whether she
 e Wife of such a Man, it is to be tried *per*
 ; and if she be Wife *de facto*, shall be tried
 hat Issue; but Loyalty of Matrimony is to
 ied by the Bishop, by Certificate.

in. 13 Car. 2. B. R. In Debt on a Bond to
 money at Marriage, *unques accouple* does not
 the Right of Marriage in Question. Ex-
 on was taken; it is not alledged that the
 was married at the Time of the Bill; but
 being joined upon married or not married,
 Verdict this shall be aided, there being a
 Negation and Affirmation. *1 Glascock*
Morgan.

ow the Difference between a Marriage in
 t and a Marriage in Possession is much to
 arded, and ought to be carefully attended
 Pleadings.

riage in Possession is sufficient always in
 al Things and Causes, especially where
 ossession of the Wife is in Question: But
 e the Possession of the Husband is in Que-
 there Marriage in Right ought to be;
 where Marriage in Possession falls in Aver-
 there it shall not be tried by the Bishop,
 the Case of Marriage in Right, where *nunq'*
 is pleaded, but in *Pais*. For in Case of
 e in Possession *nunq' accouple* is no Plea,
 not his Wife: So is the Case *12 Ed. 3.*

Br.

*Diversity be-
 tween a Mat-
 riage in Right
 and a Marri-
 age in Possessi-
 on, and the
 Consequence
 thereof in
 Pleading.*

How Marriage shall be tried. Cha

Br. 481. *A.* brought an Action of *T* against *B.* and *C.* *B.* pleaded that *C.* is the Plaintiff, and demanded Judgment Writ; the Plaintiff in his Replication said *accouple*, and this Replication was noted, but he was driven to say not his for if *C.* were the Wife of the Plaintiff's session, or by Reputation, it is sufficient to bate the Writ.

Upon Marriage *de jure infra annos* when the Husband be murder'd before his Age the Wife shall have an Appeal of Murder a Writ of Dower.

Of the Certificate of the Bishop, and the

E. and his Wife demanded her Dower Lands of *W. S.* her former Husband. The Defendant pleads *nunq' accouple en loyal Matrimony*. The Issue was, *Quod fuit accouple Matrimony*; thereupon a Writ was awarded the Bishop, who certified that she was coupled in *vero matrimonio cum prædicto clandestino, & quod W. & E. thori & participatione nondum cohabitaverunt usque mortem prædicti W.* Upon this Certificate judgment was given for the Demandant. *E.* signed was, because there was neither Time or Place of the Marriage mentioned in the Bishop's Certificate. *Sed non allocatur.* The Day or Place of the Marriage is not necessary for it is not issuable, because the Certificate from the Bishop is concluding. 2. It was signed, that this Certificate is not good because it doth not answer to the Words of the Issue, which was *n'unq' accouple en loyal Matrimony*; he ought to have answered, *fuit copulatus in legitimo matrimonio*;

saith, *Quod vero matrimonio, sed clandestino*, which is but argumentative that they were lawfully married, their cohabiting at Bed and Board: *Sed non allocatur*: for *vero matrimonio* is as good as *legitimo*, and though it be *clandestino* it doth not vitiate the Marriage, and the other Words prove they continued as Baron and Feme. *Cro. Car. 351.*

In a Writ of Dower, upon an Issue *n'ung; accouple, &c.* if a Writ issue to the Bishop to certify, &c. and he certifies that the Husband being of 11 Years, 10 Months and 20 Days of Age, and the Wife of 16 Years of Age intermarried *in facie Ecclesie*, and so they were *accouple en loyal matrimony*; this is not a good Certificate, because it doth not give a full Answer, to the Writ, whether they were *accouple en loyal matrimony*. *Dyer 313.*

But if upon such Writ and Issue the Bishop certify, that he had made diligent Inquisition of the Matter, by which he had found by lawful Proofs that the Woman at such a Place in certain was accoupled in loyal Matrimony to the said Husband mentioned in the Writ; this is a good Certificate, although it was objected that he should have certified his proper Opinion, and not only the Inquisition, for he had not certified so much as the Writ requires in Effect. *Dyer 368.*

The Plaintiff brought a Writ of *rationabili parte bonorum* against the Executors of the Husband, and demands her Part of divers Goods in certain. The Defendant pleads, *n'unique accouple en loyal matrimony*; upon which a Writ was awarded to the Bishop of *Chester*, in whose Diocese the Wife pleads the Marriage: The Plaintiff, who had the Carriage delivers it to the Bishop, and prays him to examine it; upon which

which, and Notice given to the Defendant did examine divers Witnesses; afterwards Plaintiff seeing the Bishop inclinable to him, took away the Writ from the Bishop's Secretary. The Defendant takes another without Motion in the Court, *Teste* the Term; upon which the Bishop, without Examination, and without Notice of this to the Plaintiff, returns under his Seal *Episcopus N'unique loyal accouple*; and the Defendant thereupon prayed Judgment: *Per Curiam*. Writ taken out by the Defendant without Motion was irregular, but by the Prothonotary Irregularity was in Defect of Notice to the Plaintiff. In this Case the Plaintiff had two children by the supposed Husband, which were by this Certificate made Bastards, although reputed legitimate before. *Sir Thomas Jones, p. 3*

A Certificate of Marriage by the Bishop peremptory, the Marriage being at *Utrecht* beyond Sea, and certified under the Seal of the Minister there, and of the said Town, and they cohabited two Years together as Man and Wife, was held a sufficient Proof that they were married. *Cro. Jac. 542. in Alsop's Case.*

C H A P. VIII.

Marriage, and the Consequence of it
by Law.

What Alterations are made by Marriage as to the Names of Dignity; as to Change of Name of Estates devised. Where or in what Cases Marriage shall amount to a Countermand or Revocation of Livery or Attornment. If Marriage be a Revocation of a Will or Countermand of Arbitrament. If Marriage be a Breach of a Condition by Way of Disability. A Lady of a Manor marries a Co-heiress, if it be a Suspension. In what Cases Marriage is a Release in Law, or not. A Woman Jailor marries a Prisoner, if it be an Escape or not. Where a Term is extinct by the Intermarriage or not. In what Cases the Husband shall be said Assignee of the Wife or not.

What Alterations are made by Intermarriage.

If a Woman that is noble by Descent marry a Man that is under the Degree of Nobility, she remaineth noble still; but if she gaineth Nobility by Marriage, she loseth it, if she marry under the Degree of Nobility; and so the Rule to be understood, Si mulier nobilis perit ignobili, definit esse nobilis. But if a Dutchess by Marriage marry a Baron of the Realm, she remains a Dutchess, and loseth not her Name, because her Husband is noble. Et de ceteris.

E

A

*As to Devisees
having chan-
ged their
Name by
Marriage.*

A Man had Issue a Son and a Daughter, devises his Lands to his Son in Tail, and he died without Issue, that it should remain to the next of his Name, and died: The Son died without Issue, the Daughter being then married, and the Question was, Whether she should have the Land. *Per Curiam*: She shall not; for she had lost her Name by her Marriage; but it shall go to the next Heir Male of the Name. *Altho* if she had not been married; for then she should have had it, for she then was the next of his Name. *Cro. Eliz.* 532. *Bon and Smith*: And so was *Jobson's Case*, *Cro. Eliz.* 576. *Jobson* devised Lands in Tail, the Remainder to the next of his Kin of his Name; and at the Time of his Devise, the next of his Kin was his Brother's Daughter then married to *J. S.* The Devisee dies; the Tenant in Tail died afterwards without Issue: This Daughter shall not have the Land for she is of her Husband's Name; but if she had been unmarried at the Time of the Devise and Death of the Donor, tho' she had been married at the Time of the Death of the Tenant in Tail without Issue, yet she should have had the Land.

As to Alteration of Estates, *Vide Tit. Moieties*

As to the Goods and Leases of the Feoffment. *Vide infra.*

As to the Alteration of Actions, *Vide Tit. Abatement.*

I shall only at present consider,

Where and in what Cases Intermarriage shall amount to a Countermand, Revocation, Release, Suspension, or Extinguishment.

*Livery within
the View not
revoked by
Marriage.*

Two Women were Joint-tenants in Fee, one of them made a Charter of Feoffment to *J. S.* and *Live*

every within the View, and afterwards, before
 was executed, marries. *Per Curiam*: This Li-
 very was well executed after the Marriage, for
 interest passeth by the Livery within the View,
 which cannot be countermanded; the effectual
 of it, *Go and enter and take Possession*, was
 before the Marriage; though the Estate be in
 Wife till Entry, she hath put it in the Feof- *Pleading.*
 Power, and when he enters, it hath a
 Retrospect to the Livery, and shall be
 as a Feoffment when she was sole.
Contr. 186. Parsons and Peras.

A Livery by Letter of Attorney, is revoked
 Marriage; but Livery within the View is a
 Livery.

A. a Feme sole Lease for Life or Years, and *Attornment.*
 grants the Reversion to B. and afterwards
 C. to Husband, this is a Revocation of the *V. 4 & 5*
 ; so that nothing shall pass to B. by the *A. c. 16.*
 of the Lessee afterwards, because
 the Intermarriage C. is seised in the Right of
 Wife, and had a Possibility to be Tenant by
 Courtesy. *2 R. 2. Attornment 8. Vid. 4 Co.*
Force and Hembling's Case. But if A. the
 , after the Grant of the Reversion to B.
 taken B. to Husband, this had not been any
 of the Grant, but that the Lessee
 have settled the Reversion by Attornment
 afterwards, because the Husband may not have
 better Estate by the Intermarriage, than he
 have by the Grant. *Ibid.*

A Woman deviseth Lands to A. and his Heirs, *Devise.*
 survive her, and after she intermarries with
 Maid A. It was agreed *per Curiam*, that by
 taking him to Husband and Coverture at
 the Time of her Death, the *Will* is counter-
 voided, it being her own *A. c. 4 Co. 61. Force*
Hembling.

Exchange.

If two Women exchange Lands, and marries before Entry, this shall not defeat Exchange.

Arbitrament.

If *A.* of the one Part, and *B.* and *C.* a Feme sole of the other Part, submit themselves to Arbitrament of *J. L.* and afterwards *C.* takes *S.* to Husband, and after the Arbitrator, before any Notice of the Marriage, makes an Award that *B.* and *C.* shall pay 30 *l.* to *A.* yet this shall not bind *J. S.* and *C.* his Wife, nor *B.* for Submission by the Marriage of *C.* is revoked to *B.* also; and this also without Notice. 1 *Abr.* 331. *White* and *Gifford*. So is *Saccu* Case, 2 *Keb.* 865. In Debt on Bond to submit to an Award; the Plaintiff on Oyer pleads the Intermarriage of the Wife with the Plaintiff before the Award; to which the Defendant demurred. *Per Curiam*: Marriage is her own Act, and was a Revocation of the Power given to the Arbitrators.

If Marriage be a Breach of the Condition as to Disability.

A Widow binds herself in a Bond condition that if the said Obligor from Time to Time and at all Times, upon Request, do such Act and Acts for the conveying of such Messuage, &c. and for such Estates, &c. The Obligee tenders Assurance, which was not according to the Condition, but differed in the Limitation of the Estate, and the Obligor refused to accept. She afterwards married, and the Question was If the Marriage were a Breach of the Condition she having disabled herself to make a Conveyance, and the Baron is entitled to be Tenant of the Courtesy, and yet it is but a Possibility; and the Court advised the Defendant to make good Conveyance. *Hardr. p.* 463. *Edward* and *Owen*.

Copyhold suspended.

A Feme sole seised of a Manor wherein there were Copyholds; one of the Copyholders married.

ries with the Feme, the Copyhold is suspended by her Intermarriage. *Godb. 11. Cro. Eliz. p. 7.*

What Agreements between the Husband and Wife, stand good or be extinguished by the Marriage.

It is commonly held in our Law Books, that Agreement between Husband and Wife before Marriage is extinguished by the Marriage. *Hob. 116. Smith and Stafford*; but with this Diversity, it was the Case of the Lady *Pridgeon* in Chancery. She being a Widow, upon her Marriage with Sir *Francis Pridgeon*, suggests an Agreement precedent to the Marriage between him and her, and others on her behalf, That notwithstanding her Marriage, the Rents and Profits of all her own Estate, and what personal Estate and Goods she had should be at her own Disposal; but the Executors of Sir *Francis* claimed them: And the Chief Baron *Hale*, who assisted at the Hearing, declared, That though where an Agreement is between Baron and Feme before Marriage, that the Wife may by her Will dispose of Part of her Estate, or for a Thing which is future to the Marriage, such an Agreement was not dissolved by the Marriage; yet where an Agreement is to have Execution during the Coverture; as was in the Case of the said Lady *Pridgeon*, there the Marriage extinguisheth such an Agreement; and they concluded that the Plaintiff had no Ground of Suit. *Cases in Chanc. 117, 118. Smith and Stafford's Case* was upon Speech of Marriage between *A.* and *S.* He promised, that if she would marry him, and he died before her, he would leave her worth 100 *l.* She married him: Now whether the Promise in Law was released by this Marriage was the Question. And it was judged contrary to the Opinion of *Hobart*,

that it was not released, not being to be formed till after the Death of him that the Promise.

The Lady *Darcy* being a Widow, and of a Jointure of 700 *l. per Annum*, agreed to marry Mr. C. and he, before the Marriage, agreed with her by Writing, that it should be lawful for her, or such as she should appoint, to receive and dispose of the Rent of her Jointure as she pleased; a Deed was put into the Hands of *H.* her Husband. They married, and for ten Years *H.* received the Rents, and with the Approbation of the Lady paid the same to Mr. C. He died, and the Lady exhibits her Bill to have Account of the Rents from *H.* and made Title to the same by the Agreement. *Per Curiam*: The Agreement was extinct by the Intermarriage. *Cases in Equity* 21.

So if Baron and Feme lease at Will the Land of the Wife, rendering Rent, and the Husband dies, yet the Lease shall continue. 1 *Inst.*

Release in Law.

If Feme Obligee take the Obligor to Husband this is a Release in Law; so it is if two Obligees, and one takes the Debtor to band; but if the Feme Executrix take the Debtor to Husband this is no Release in Law for that would be wrong to the Dead in Law work a *Devastavit*, which an Act of Law shall never work. 1 *Inst.* 264. *b.*

As to Marriage being a Release in Law *Assumpsit*, *Vide Hob.* 216. *Smith* and *Sid.* and 2 *Sid.* 58. & *postea*.

Intermarriage repeals her Submission to Arbitrament *dum sola*. 3 *Keb.* 9.

Escape.

Plat's Case Plowd. 17. *a.* If a Woman be taken out of the Fleet, and one that is in Prison marry her, he is thereby out of Prison, as

law adjudgeth him thereby to be enlarged, because it is repugnant, that he, as her Husband, should have the Custody of her, and she, as a Taylor, the Custody of him, cited 2 Vent. 19.

An Action of *Debt for Rent* upon a Demise of Lands by Indenture made by the Plaintiff to John Acton, the Defendant's late Husband, who died intestate, and the Action was brought against the Defendant Elizabeth Acton, as Administratrix.

The Defendant pleaded in Bar, that before her Intermarriage with the said John Acton, he by his Writing obligatory became bound to the said Elizabeth whilst sole, by the Name of Elizabeth Reynolds Spinster, in the penal Sum of 1000 l. *Solvend' eidem Elizabethæ cum inde po-
tea requisit. esset cum Conditione prædict' scripto
obligatorio subscript. recitando*, That whereas a Marriage was intended between the said John and Elizabeth; then if the said Elizabeth should happen to survive the said John, and he die before her, then if the said John Acton should live, or if his Heirs, Executors, or Assigns should pay to the said Elizabeth, her Executors, Administrators or Assigns, the full Sum of 1000 l. within one Month after the Death of the said John Acton, then the Bond to be void.

That afterwards the Marriage did take Effect, and John Acton died intestate, and did not leave to the said Elizabeth the Sum of 1000 l. or one Penny thereof; and that since his Death the Sum of 1000 l. or any Part thereof, hath not been paid by the Heirs or Assigns of the said John; and that on such a Day, &c. Administration of the Goods and Chattels of the said John was by such, &c. committed to her; and that afterwards several of the Goods, &c. which were her Husband's Goods, to the

Value of 230*l.* and no more came Hands, which Goods she doth retain of Satisfaction of the Bond aforesaid.

The other, which was the chief Point Whether the Intermarriage of the Obligor the Obligee had extinguished the Debt?

And after several Arguments at the Bench Court, consisting of three Judges, gave Opinions *Seriatim*; and Gould and (Justices) were of Opinion, that the Bond not destroyed, nor the Debt extinguish the Marriage.

They agreed, That all Contracts and *in presenti*, though they are to be performed *in futuro*, especially when a certain Payment is prefixed, such are all extinguished by the Inter-marriage; nay, if it is upon Contingency, which might possibly happen during the Coverture.

But there are several Things, which upon several Occasions are kept *in Custodia Legis* preserve a Right; and a Suspension of a particular Action doth not always extinguish that Action.

Modus & conventio vincunt Legem, a Fiction of Law shall work a Wrong; if a Executrix marrieth the Debtor, yet she preserves the Debt, lest a Wrong should be done to the Creditors.

Now in the principal Case, this Bond Provision for the Wife in the Personalty, and the Law will preserve for her Livelibood, and as it preserves her Dower, which is in the Real Estate.

Dyer 6, 7.
Moor 236,
855. 8 Rep.
131. Sir John
Needham's
Case.

Where the Debtee takes the Debtor to himself as Husband, 'tis reasonable that the Debt should be extinguished, because it seems to be by the Agreement of the Parties that it should be so; but here it is expressly against the Intent of the Parties, that the Debt should be extinguished.

and therefore the Law will preserve it and not work a Wrong.

That there is no Difference in Reason between a Bond with a Condition before Marriage, and a Promise or Covenant before Marriage; and by the Cases in the Margin it appears, that a Release of all Demands will not release a Bond with a Condition upon a Contingency, and not broken.

But *Holt C. J.* was of a contrary Opinion, because this was in the Case of a Bond with a Condition, which was distinct from the Bond; and therefore immediately upon the Execution of the Bond, there was a Debt *in presenti*, which still exists, and the Condition is subsequent to the Bond; and he relied upon *Hoe's Case*, 5 *Rep.* to make out the Difference between a Covenant, a Promise and a conditional Bond, and a Bond with a Condition in Nature and Defeasance; for in an Action on this Bond, if the Defendant doth demur, the Plaintiff will have Judgment without shewing a Breach.

If this Bond had been given by a Stranger to the Woman when sole, the Husband might have released it by the Words of all *Debts and Demands*; and this Bond is the same as if it had been single, and a Defeasance by another Deed, for the Condition thereof is not the Thing releasable, but the Bond which is a Duty *in presenti*; and he agreed the Cases of Promises and Covenants before Marriage, but insisted that this was different.

But by the Opinion of the other two Judges, the Defendant had Judgment, upon which a Writ of Error was brought in the Exchequer-Chamber; but the Plaintiff in Error perceiving the Court inclined to affirm the Judgment, did not proceed. *Carthew* 511, &c. *Gage* *vers.* *Atton*.

Cro. Car.
372. *Webb*
vers. *Dorchester.*
Hob. 156,
216. 2 *Roll.*
Abr. 407.
2 *Cro.* 170.
Litt. Rep. 87.
Hutt. 17.
Sid. 58, 59.

If

If a Feme Sole give a Warrant of Attorney and marry before it is entered, the Warrant is countermanded, and Judgment shall not be entered against the Husband and Wife. *Salk. 399 Shower 91. contra.*

If the Husband and Wife by Deed agree before Marriage, that the Wife shall have Power to dispose of her Estate as she pleases, during the Coverture, and the Deed is put into the Hands of J. S. her former Agent, who during the Coverture pays the Rents and Profits to the Husband, with the Wife's Approbation, J. S. shall not be answerable for what he had received and paid to the Husband during Coverture; for the Agreement being between the Husband and Wife only, it determined by the Marriage. Decreed *Pasch. 15 Car. 2. between Darcy and Chute, 1 Chan. Ca. 21. but Qu. of this Reason.*

For where a Man entered into Articles with his intended Wife, to settle certain Lands on her &c. the Marriage is solemnized, and the Husband died before any Settlement made; yet it was decreed, that the Heir of the Husband should execute the Agreement; though it was urged, that the Marriage was a Waiver of the Benefit of it, and a Release in Law. *Mich. 30 Car. 2. between Haymes and Haymes, 2 Vent. 343.*

A Man enter'd into a Bond, conditioned to leave his intended Wife 1000 l. the Husband mortgaged his Estate, and died; and it was decreed, that though the Bond was by Law void, being extinguished by the Marriage, yet it should be good in Equity, and that the Wife may redeem and hold the Land till she was satisfied her Debt. *Hill. 1704. between Aiton and Pierce, 2 Vern. 480.*

Where

Where a Term is extinguished or not. Where it comes to Husband and Wife, who had the Inheritance.

Lease for Years, the Reversion for Life to *A. Feme Covert*, and the Lessee grants his Estate to the Husband, and after the Wife dies; the Term is not extinct, because the Husband had the Estate in several Rights; for the Freehold was in the Wife, and the Husband only seized in her Right. *1 Roll. Abr. Lechden and Winsmore.* So it is adjudged in the *Lady Plat* and *Sleep's Case*. The Husband has a Term for Years in his own Right, and the Inheritance after descends to his Wife; that coming to her *ex parte droit*, shall not drown and extinguish the Term for Years, which he had in his own Right; and so he may assign and dispose of his Term at his own Pleasure, notwithstanding the Descent of the Inheritance to the Wife. *Cro. Jac. 275. Godb. 20.*

A Lease made to Baron and Feme for Years, who enters; the Lessor afterwards enfeoffs the Husband, who died seised; the Feme survives and claims the Term; and the Question was between the Wife and the Heir of the Husband, Whether the Term was extinguished? *Et per totam Curiam*; By the Acceptance of the Feoffment the Husband had surrendered the Term, and it is extinguish'd: But if the Conveyance had been by Bargain and Sale inrolled, or by Fine, it had been otherwise. *Cro. Eliz. 912. Downing and Seymour.*

If a Feme lease at Will, rendring Rent, and after take Husband, this doth not determine the Lease, but the Baron and Feme shall have an Action for the Rent, *1 Inst. 55. 4.*

So

So if a Lease be made to a Feme, rendring Rent, who takes Husband, this doth not determine the Lease, but an Action lies against them for the Rent, or Distress. 1 *Inst.* 55. b.

*The Husband
an Assignee of
Contract.*

A Debt on Bond against Baron and Feme being made in her Viduity, with Condition that she, her Heirs and Assigns, perform all Contracts in a Lease made by her Husband of Warren to the Plaintiff. She takes another Husband, who entreats on the Plaintiff. The Agreement found by the Jury. Now there was no Estate alledged in the former Husband in the Right of his Wife; whereby though the second Husband be Assignee in Law, yet he enters as of his own Wrong, not claiming under her. But *per Curiam*, It is not requisite that the Husband be Assignee of the Estate, but her Assignee of the Contract: She is bound for some intended Interest, though no certain Estate appear, which the Husband hath by Marriage, and doth act in her Right. 1 *Keb.* 348, 512. *Hall versus Gresham & Ux.*

C H A P. IX.

What Things of the Wife are given or accrue to the Husband by the Intermarriage, or not. What he gaineth of his Wife's Lands in Fee by the Marriage. What Estate or Interest he gaineth in her Chattels Real, and Chattels Mixt, which are partly in Possession, and partly in Action. Diversity between Property in personal Goods and a bare Possession. What Things of the Wife the Husband may release or discharge, or not; as Obligations, Annuities, Promises, &c. What Acts, Charges, or Forfeitures of the Husband shall charge the Wife

Wife after his Death. How and wherein the Wife shall be bound by her Husband's Submission to an Award, or for Rent for an Owelty of Partition. How the Husband may charge the Land of the Wife by Rent, Statute, Judgment, &c. What Lands of the Wife shall be put in Execution for the King's Debt upon the Husband. What Act of the Husband amounts to a Forfeiture of the Wife's Land, and for how long. What Acts of the Husband and Wife shall be construed as the Act of the Wife, so as to bind her after his Death, or not. For what Acts or Facts of the Wife the Husband shall be punished: Et econtra. Of Paraphernalia. What Things or Actions the Wife shall have after the Death of the Husband. What Actions Real; what Things and Actions Personal; as Obligations, Recognizances, Goods or Money purloined. What Things Real, as Rents, Leases, &c. What Things the Husband shall have after the Death of the Wife; as Leases in Trust, Arrears of Rents, Presentations, &c. What Things the Wife may make good after the Death of the Husband, as Bonds, Rents by Acceptance.

THIS Title is of great Use, as will appear by the subsequent Cases, both as to the Present Profit after Marriage, as for the future Advantage after the Death either of Husband or Wife.

If a Man take to Wife a Woman seised in Fee of Lands, he gaineth by the Intermarriage an Estate of Freehold in her Right; which Estate is sufficient to gain a Remitter; and yet the Estate which the Husband gaineth, dependeth upon an Uncertainty, and consisteth in Privity; or if the Wife be attainted of Felony, the Lord by

What the Husband gaineth of Lands in Fee by the Intermarriage.

by Escheat shall enter and put out the Husband: Otherwise, if the Felony be committed after the Issue had. Also, if the Husband be attainted of Felony, the King gaineth no Freehold, but a Pernancy of the Profits during the Coverture, and the Freehold remaineth in the Wife. 1 *Inst.* 351. a.

Chattels Real.

As for what Interest the Husband hath by the Intermarriage in a Term of Years of the Wife, and how he may or may not dispose of it. See below, *Chap. XXII.* and in this *Chap. versus Finem.*

Chattels Mixt.

Chattels Real being of a mixt Nature, (*viz.*) partly in Possession, and partly in Action, which happen during the Coverture, the Husband shall have by the Intermarriage, if he survive his Wife, albeit he reduceth them not into Possession in her Life-time; but if the Wife surviveth, she shall have them. As if the Husband be seized of a Rent-Service, Charge, or Seck in the Right of his Wife, the Rent becomes due during the Coverture: The Wife dieth, the Husband shall have the Arrearages; but if the Wife survive the Husband, she shall have them, and not the Executors of the Husband. So it is of an Avowson; if the Church become void during the Coverture, he may have a *Quare Impedit* in his own Name; but the Wife shall have it if she survive him: But if the Arrearages had become due, or the Church had fallen void before the Marriage, there they were merely in Action before the Marriage, and therefore he should

Rest.

Quare Impedit.

could not have them by the Common Law, though he had survived her. But now by Statute of 32 H. 8. cap. 37. if the Husband survive the Wife, he shall have the Arrearages well incurred before the Marriage as after.

1 Inst. 351. a.

A and his Wife brought a *Quare Impedit* against H. and made Title to present in the right of his Wife, and after Issue joined the Wife died. *Per Winch*: The Writ is not abated, because this was a Chattel vested in the Husband during the Life of the Wife. *Winch*,

173.

Chattels Personal.

Marriage is an absolute Gift of Chattels Personal in Possession of her own Right, whether the Husband survive the Wife or not: But of Personal Goods *en auter droit*, as Executrix, or Administratrix, &c. the Marriage is no Gift of them to the Husband, although he survives his Wife. 1 Inst. 351. b.

But there is a Diversity between Property in Personal Goods (as is aforesaid) and a bare Possession; for if personal Goods be bailed to a Wife, or if she finds Goods, or if Goods come into her Hands, as Executrix to a Bailiff, and she gives them to her Husband, this bare Possession is not given to the Husband, but the Action of Detinue must be brought against the Baron and Feme. 1 Inst. 351. b.

By the Custom of *London*, the Wife shall have the Moiety of the Goods whereof her Husband was possessed; yet the Husband in his Life-time may give all the Goods; but by his Will he cannot prejudice her concerning her Part. *Cro.* 345. But this is alter'd by Stat. 11 G. 1. which see below.

Custom of London.

Monopoly.

Glanvil, in his Lecture on the Statute of 1 Jac. Of Monopolies, 16 Febr. 1629, put this Case: If a Feme Sole hath a Patent for the sole using of a Trade invented by her, and after taken a Husband, yet the Husband shall have the Advantage of this within the Statute, because he is Assignee in Law.

Chose en Action.

Things in Action, as Debts by Obligation, Contract, or otherwise, the Husband shall not have them, unless he and his Wife recover them. If a Feme Covert be seised of an Advowson, and the Church becomes void, and the Wife dies, the Husband shall present: *Aliter*, of a Bond made to the Wife, which is merely a *Chose en Action*. 1 Inst. 120.

Estray.

If any Estray happen within the Manor of the Wife, if the Husband die before Seizure, the Wife shall have it; for that Property was not in the Wife before Seizure.

Statute.

If a Statute be acknowledged to Baron and Feme, they are Joint-tenants of it; and the Wife shall have all by Survivor: So if a Bond be made to Baron and Feme. 4 Ed. 3. 3. b.

Damages.

If Baron and Feme recover Land and Damages, the Feme shall have the Execution of the Damages, and not the Executors of the Husband. 4 Ed. 3. 13.

A Feme Sole obtained a Judgment in Debt for 200 l. and then she married; and afterwards the Husband and Wife brought a *Scire facias* upon this Judgment, to have Execution thereof against the Defendant in the original Action, and they had likewise Judgment on the *Scire facias*, (*viz.*) That the Husband and Wife *habeant Executionem* against the Defendant;

ut; then the *Wife* died, and after her Death
the Husband, in his own Right, brought an-
other *Scire facias* against the Defendant, re-
quiring the Judgment in the original Action,
and the Award of Execution upon the first *Scire*
facias, (*viz.*) To have Execution of the Judg-
ment, &c.

To this the Defendant demurred, and Judg-
ment was given in the Court of Common Pleas
for the Husband the Plaintiff; upon which, the
Defendant in the original Action brought a
Writ of Error in *B. R.*

And adjudged, that the Award of Execution
attached in the Husband by the Judgment in
the first *Scire facias*, and shall survive to him.
New 415. Woodyer versus Gresham, S. C.
116.

If a *Feme sole Obligee* takes Husband, and the
Husband makes a Letter of Attorney to *J. S.* to
receive the Money, who receives it according-
ly, and after the Wife dies; the Executors of the
Husband shall have Action of Account for the
Money, for by this Receipt it becomes a Thing
in Possession. *Trin. 13 Eliz. B. R. Huntley*
Griffith, Moor 452.

If a Legacy be devised to a Woman who takes
Husband, and the Husband makes a Letter
of Attorney to *J. S.* to receive the Legacy, and
receives it accordingly; by this Receipt it
seemeth to be a Thing in Action, and becomes
a Thing in Possession, and the Husband, or
Executors, after the Death of the Wife, shall
be Account upon this Receipt. *Ibid. Moor*
See lower in this Chap.

If a Baron possess'd of an Obligation in the *Bond*.
of the Wife, may give it to a Stranger,
the Donee may justify the Detaining of it
F after

after the Death of the Husband. *Mich.* 38.
39 *Eliz.* B. R.

*Executor of the
Husband to
have the
Wife's Goods.*

If the Wife have Goods, and take an Husband, and the Husband dies, the Executors of the Husband shall have the Goods. If the Wife have Goods, and take Baron, and Baron dies, the Executors of the Husband shall have the Goods, because the Property lies in him by the Intermarriage, notwithstanding the Losing. If the Goods of a Woman are taken, which Woman takes an Husband, the Husband alone shall have the *Replevin*. *Siderf.* 174. *Powel* & *Marshall*.

Term.

Land is devised to a Feme Executrix during the Minority of *A.* to hold to her own Use without Account, provided that she keep and educate the said *A.* at School, &c. This is for a Term in the Executrix, as is given to the Husband upon the Intermarriage; and the Education and Keeping of the Child is not such a particular Privilege; but it may be performed effectually by another. *Hob.* 285. *Baldex* & *Blackburn*.

Arbitrament.

An Husband submits to an Arbitrament concerning the Wife's Term, it shall bind the Wife for if the Baron had granted over the Term, it would have bound the Wife; and by Consequence the Submission being for the Interest and Title of the Term, is as much in Effect, as if he had granted over the Term. *Dyer* 1. *in Margine*.

But tho' the Husband doth gain these Things by the Intermarriage, yet if he be bound in Obligation, and the Condition is, that he shall not sell the Apparel of his Wife, this is good, as if a Man bind himself to a Stranger to pay 20 *l.* per Annum to his Wife, that is good, with

h. IX. *in each other's Portion.*

87

in doubt. By Coke, Smith, and Watson's Case;
Roll. Rep. 334.

A Man sued in the Spiritual Court for his
Wife's Portion, and the Court of Chancery
granted an Injunction to stay Proceedings, till
such Time as he had made a competent Join-
ture. *Toth. 114.*

So where A. married the Legatee and Exe-
cutor of J. S. who, together with his Wife,
owed 200 l. due by Bond to the Testator;
the Defendant confessed the Debt, but insisted,
that the Husband not having made any Provi-
sion or Settlement on his Wife, was not intitled
to the Money; and the Court declared, that
the Security should remain as it was till such
Time as the Husband should make a suitable
provision, or till further Order from the Court.
Chanc. Rep. 377. The same Thing order'd;
Ann. 288. Admitted to be the constant Prac-
tice, *2 Vern. 494.*

But if the Husband and Wife demand the
Execution of a Trust of a real Estate, devised
by Will for the Benefit of the Wife, it must be
performed according to the Will, for the Wife is
the *Trustee*; who, when she has Execution,
may dispose of it as she pleases: But in Case of
Personal Demand, my Lord Chancellor said,
the Court may impose Terms on the Husband.
Feb. 1708. Vid. Vern. 626.

An Infant, intitled to the Trust of Lands in
Fee by a collateral Ancestor, marries without her
Father's Consent, and the Father brings a Bill
against the Husband and Wife, and her Trustees,
that a Provision might be made for her out of
the Lands; the Husband and Wife demur to
the Bill; and the Demurrer was allowed; for it
appears by the Plaintiff's own Shewing, that
she has no Right, either in Law or Equity, to

the Lands: But my Lord Chancellor said, that the Husband had been Plaintiff, and been seeking any Favour from the Court, he could then make him do what was reasonable. *Pasch. Car. 2. between* *1 Vern. 39.*

What the Husband may release or discharge or not.

Covenant.

The Covenant was, That a Stranger should pay 8 *l.* yearly to one of the Covenantees, and to one *F. I.* a Stranger; *F. I.* took to Husband one *B.* who did release the Payment. *Per Curiam* *B.* is a Stranger, to whose Wife the Payment is to be made; now he cannot release this, he having no Right at all therein, nor yet any Remedy to come by it: And Judgment was given *Quer.* 3 *Bull.* 29. *Quick and Harris versus Ludbotrow.*

Annuity.

A Widow brought an Annuity against *A.* for 30 *l.* Annuity, granted by the Defendant to the Plaintiff by Indenture. To which the Defendant pleads a Release by express Words, reciting the Annuity made by the Husband of the Plaintiff during the Coverture. The Plaintiff demurs, and *per Curiam*, The Bar is not good, because the Husband may not extinguish the Annuity of the Wife, being an Annuity for Life; but that she, if she survive the Husband, shall have an Action for it. *Moor* 523. *Thomson and Butler.*

After Divorce.

If Husband and Wife are divorced *causa adulterii*, yet the Husband may after release a Legacy due to the Wife; for the Divorce does not divorce the *Vinculum Matrimonii*, but a *Menj & Thoro.* 43 *Eliz.* *Stephen and Tott, Roll. Rep.* But if after such Divorce the Wife sues without the Husband, as she may for a Defamation

the Spiritual Court, and recover, and Pe. V. Postea. Once enjoined, *expensa Litis* taxed, the Husband may not discharge this. 14 Jac. New-
man's Case.

If *A.* promise *B.* a Feme Sole, that in Con- *Promise.*
sideration she will marry *C.* his Brother, that he
will give *B.* 10 *l.* if she survive *C.* And after *B.*
takes *C.* to Husband accordingly; *C.* cannot af-
ter discharge *A.* of this Promise by his Release,
to bind *B.* after his Decease, because the Pro-
mise rests in Contingency during the Life of *C.*
the Husband. *Hill. 6 Eliz. B. R. Belcher and*
Adson. Hob. Smith and Stafford's Case.

A Legacy of 10 *l.* was bequeathed to a Feme *Legacy.*
covert, to be paid eighteen Months after the
Death of the Devisor. The Testator dies, and
after the Wife within the eighteen Months dies,
and the Daughter of the Wife took Administra-
tion. But the Legacy belongs not to the Daugh-
ter, but to the Husband; for the Husband had
an Interest in it before the Time of Payment
arrived, and he might have released it. 2 Roll.
136.

If the Husband be indebted to the King, he *Assignment of*
may assign a Debt due to the Wife before Co- *a Debt due to*
verture; as *B.* was indebted by a Statute in *the Wife, by*
100 *l.* to *C.* who dying intestate, Administra- *the Husband*
tion was committed to his Wife, who married *to the King.*
Done; Facone became bound, with another,
to the King in 600 *l.* and he and his Wife did
assign this Statute by Deed inrolled to the King,
for the Payment of the said 600 *l.* *Per Curiam:*
This Assignment is good, notwithstanding the
Statute of 7 Jac. *Vide Hob. 253. Breadman*
Coles.

If a Feme be indebted to *J. S.* in a certain *Arbitrament.*
Debt, as Administratrix to *J. D.* and she takes
a Husband, and the Husband and *J. S.* sub-
mit

mit all Matters between them to the Award
W. M. he may make an Award of this Debt
 that is due by the Baron and Feme, although
 be done in Right of the Wife, and as Admin-
 istratrix, for it is now chargeable by the In-
 marriage. 1 *Roll. Abr.* 246. *Cro. Jac.* 4
Lamley and Hutton. So an Arbitrator may make
 an Award upon such Submission of a Debt
 the Wife as Executrix. 21 *H.* 7. 29. *b.*

If *A.* and *B.* submit to the Arbitrament
J. S. of all Suits and Actions depending
 between them two, the Arbitrator may not make
 an Award of an Action that *B.* and his Wife
 have depending against *A.* for this is out of
 Submission. 1 *Roll. Abridg.* 246. *Brocas*
Scavage.

What Acts, Charges, or Forfeitures of the Husband shall bind the Wife after his Death.

As for the Disposition of the Wife's Tenement
vide infra, and Chap. XXII.

Attornment.

If the Husband attorn to a Grant in Part
 Deed, this shall bind the Wife. 9 *Co.* 85
Connie's Case.

*Legacy re-
 leased.*

A Legacy is given to a Feme Covert, and
 Husband releaseth, and after he and his Wife
 sue in the Court Christian for the Legacy;
 Party that is sued shall not have a Prohibition
 upon the Release of the Husband, because
 Temporal Judges may not meddle with the
 Legacy; and by Consequence cannot determine
 whether the Release will extinguish it or
Idem. 173.

But in Chancery, where a Legacy was given
 to a Feme Covert, who lives separate from
 Husband, and the Executor paid it to the Feme
 and took her Receipt for it; yet on a writ
 brought

brought by the Husband against the Executor, he was obliged to pay it over again, with Interest; for Payment to the Wife is not good.

Decreed *Mich. 1684. 1 Vern. 261.*

If one Coparcener be married, and for Owel-
ty of Partition the Husband and Wife grant a Rent to the other two out of the Part of the Feme Covert; this Partition being equal shall charge the Part of the Feme Covert for ever.
Rent for Owel-ty of Partition
Inst. 196. b.

If a Baron seised for Life, or in Fee, in Right of his Wife, grant a Rent and dies, the Feme shall hold it discharged, for she comes in paramount the Charge; so if he be posselt for Years in the Right of his Wife, and grant a Rent.
Rent.

9 H. 6. 52.

The Husband is seised of Land in the Right of his Wife in Fee; and makes a Lease for Years of it, and after he and his Wife levy a Fine come ceo, &c. to J. S. in Fee; and after the Husband dies, the Conusee shall hold the Land discharged of the Lease, for the Lease was void by the Death of the Husband; for the Husband joined for Conformity and Necessity, and all the Estate passed from the Wife. 1 Co. 76. *Bredon's Case.* 2 Co. 77. *Cromwell's Case.*
Conusee of a Fine avoids the Lease by the Husband of the Wife's Land.

So if a Baron seiz'd in the Right of his Wife in Fee acknowledge a Statute, or grant a Rent out of the Land, and after he and his Wife join in a Fine come ceo, &c. to J. S. in Fee, and after the Husband dies, J. S. shall hold the Land discharged of the Rent and the Statute, for the Cause aforesaid. 2 Co. 77. *Cromwell's Case.* So is *Harvy and Thomas's Case.* Cro. Eliz. 216. *Harrison* and his Wife sold the Land of the Wife by Deed indented, but it was not inrolled within the six Months, and afterwards the Husband

alone makes a Lease by Parol, and then the Baron and Feme levy a Fine to the Bargainee, and die; the Question was, If the Conusee of the Fine shall avoid this Lease? *Per Curiam*: He shall, for being made by the Baron only, it was void as to the Wife, and no Acceptance can make it good; and as it shall be void to the Wife, so to the Conusee: So of a Rent-Charge granted by the Husband, or a Recognisance by him.

Aliter, where the Baron and Feme are Joint-tenants.

But if Baron and Feme are Joint-tenants in Fee, or in Tail, upon a Conveyance made during Coverture, and the Husband acknowledges a Statute, and after he and his Wife acknowledge a *Fine come ceo, &c.* to J. S. and suffer a Recovery to him, and after the Husband dies; yet J. S. shall hold this charged with the Statute, for he comes in of the Estate of the Husband, as well as the Wife, and there are no Moieties between them: *Aliter*, If the Conveyance were made to them before Coverture. For if Baron and Feme are Joint-tenants in Fee, upon a Conveyance to them made before Marriage, and the Husband acknowledgeth a Statute, or grants a Rent out of the Land, or lease the Land to another, and after he and his Wife levy a *Fine come ceo, &c.* to J. S. and after the Husband dies, it seems that J. S. shall hold one Moiety discharged by the Death of the Husband, for the Husband hath not Power to charge the Moiety of his Wife, but during his Life.

Lease for Years in Right of the Wife, not to be extended on Judgment against the Baron.

If a Baron, possess'd in the Right of his Wife, of a Term, is condemned in a Judgment, or acknowledgeth a Statute and dies, this shall not be extended on the Wife. 9. H. 6. 52. b.

But

But if the Husband be indebted to the King, and purchase Lands for Years, to him and his Wife, and dies, this Land shall be put in Execution for the said Debt; for the Husband had Power to dispose of the said Term, 8 Co. 5.

Lands for Years in right of the Wife subject to the King's Debt.

171. Sir Gerrard Fleetwood. 2 Roll. Abr. 157.

If the Cognisee of a Statute dies intestate, and Administration is granted to his Wife, who marries J. S. who becomes Debtor to the King, the Chattels, which J. S. had in Right of his Wife as administratrix, shall not be extended for this Debt of the King, for that these Chattels are to pay Debts. 2 Roll. Abr. 159. Buckler and Rayes.

The Husband gave a Bond to the Wife, for Payment of a Sum of Money in Case she survived him, and after became a Bankrupt. And per Lord Chancellor, there can be nothing stopped by Way of Dividend, out of the Bankrupt's Estate, to answer this contingent Debt or Demand, when it happens; but where a Bottomree Bond was entred into, and the Ship returned safe before the Dividend actually made, they were let into a Share of the Dividend, tho' the Bond was contingent at first, because the Contingency was then at an End. Mich. 1728. *Ex parte Chawell v. Cassanet.*

If a Feme Covert agree to sell her Inheritance, so as she might have Part of the Money, and the Land is sold, and her Part of the Money is put in Trustees hands, this Money shall not be liable to the Husband's Debts, although she afterwards agreed it should be liable. Decreed between Rutland and Molineux, 2 Vern. 64.

Action brought by a Feme Covert.

2 H. 4. Sir Robert Belknap that reverend and learned Judge was banished out of the Realm (*Relegatus in Vasconiam*) not for any Defect or Offence of his, but by the Might of his potent Enemies, and the Malice of the Times; but Sybil Belknap, his Lady, continuing in England, she was wronged, and she commenced a Suit in her own Name alone, not naming her Husband: Exception being taken against it, because her Husband was living; yet notwithstanding it was adjudged good, and she recovered, which made Markham say.

*Ecce modo mirum quod fœmina fert Breve Regis,
Non nominando virum conjunctum robore Legis.*

And yet it was not any such Wonder, that the Wife should have an Action of Account as a Feme sole, where the Husband is banished by Parliament or abjured. (Abjuration is called a Divorce between the Husband and Wife.) *Weyland* 18 Ed. 1. was exiled, his Wife had her Jointure. 10 Ed. 3. The King brought a *Quare Impedit* against the Wife of an exiled Man. 14 Jac. *Wilmore* brought Trespass by the Name of Widow, her Husband living at Lisbon in Portugal.

If Baron and Feme sue a Bond made to the Wife in C. B. and the Deed is there denied, for which it remains in the Keeping of the *Custos Brevium*, and the Baron die, the Wife may have a Writ of Chancery directed to the *Custos Brevium* in B. C. that he deliver the Deed of the Wife, because the Plea is determined by the Death of the Husband.

Forfeiture.

A Baron is seized in the Right of his Wife *pur vie*, and they make a Feoffment, this is a Forfeiture during the Coverture. *By Feoffment.*

So if a Baron sole makes a Feoffment, this is a Forfeiture during the Coverture. But in these Cases it shall not be any Forfeiture against the Wife after the Death of the Husband. 8 Co. 44. *Wittingham's Case.*

But if the Husband possess of a Term in the Right of the Wife forfeit the Term, this shall bind the Wife for that he might dispose of the Term. 7 H. 6. 2. b. 2 H. 6. 2. b. *Term.*

If Baron and Feme, Lessees for Life in Right of the Wife, accept *Fine come ceo, &c.* of a Stranger, this shall not be any Forfeiture against the Wife after the Death of the Husband, because she was not examined upon this Fine. *By Acceptance of a Fine come ceo, &c.*
Dyer 148.

A Copyholder in Fee takes a Husband, who makes a Lease for Years without License, which by the Custom of the Manor is a Forfeiture; this Forfeiture shall not bind the Wife and her Heirs after the Husband's Death, but the Wife after his Death shall have it again. *Cro. Car. 7. 2 Roll. 244, 345. Savern and Smith. And Doddridge* took this Difference. Where a Feme sole is a Copyholder, and she takes an Husband, who made a Lease for Years without License, the same is a Forfeiture, because it is her Folly that she will take such a Husband as will forfeit her Land: But where a Copyhold is granted to a Feme Covert, and the Husband makes a Lease without License, in such Case it is no Forfeiture; and so in the Case of a Feme, Lessee for Life, at the Common Law against *Wittingham*, 8 Co. *Copyhold.*

41. But I find no such Difference in *Cro. Car.* And it is idle, for the Folly is the same.

*Lease of Time
for cutting of
Woods shall
bind the Wife.*

Feoffment in Fee of a Manor, to the Use of himself and his Wife for Life, the Remainder to his Heirs; and in the Manor there are Under-Woods, usually to be cut every one and twenty Years, and the Husband suffered the Woods to grow five and twenty Years, and dies. The Question was, If the Husband's suffering it to grow five and twenty Years during the Coverture shall bind the Wife so as she should not cut the Woods? *Per Curiam*: It shall bind her, for that the Time is limited by Law, and if the Time be incurred it shall not be felled afterwards. *Godb. 5. 1 Brownl. 73. 1 Leon. 61.*

*Forfeiture for
Alienation.
Forfeiture for
Condition.*

If a Man make a Lease for Years on Condition that the Lessee, his Executors or Assigns shall not alien; there if the Wife, Executrix, and her second Husband alien, this shall be a Forfeiture; for the Condition follows the Estate and is inherent to it. *Dyer 1.* But where the Agreement is Collateral and Personal, as if a Condition be that a Woman shall not beat J. S. and she takes an Husband who beats him, this shall not be a Forfeiture; for the Condition was annexed to the Person of the Wife. But the Waste of the Husband is the Waste of the Wife; for that follows the Estate, and is not personal.

Arbitrament.

Baron and Feme are possessors of a Term in the Right of his Wife, as Executrix to her first Husband, and a Stranger pretending Title to it, and the Husband submit to Arbitrament in Writing, for the Interest and Title of the Lease; and the Arbitrators award one Part to the Pretender, and the other Moiety to the Baron and Feme. *Quare*, If the Award shall bind the Wife after the Death of her Husband?

What

What Acts done by the Husband and Wife shall be construed as the Act of the Wife or not, so as to bind her after the Death of the Husband or not.

If Baron and Feme are Patrons *in jure uxoris*, Confirmation. If they confirm by Deed the Lease of the Parson, this is not good against the Wife and her Heirs, but only during Coverture; for the Deed of the Wife is void. *Dyer. 131. 1.*

Baron and Feme, Tenants for Life, join in Aid prier. the praying of Aid of a Stranger; this shall be no Forfeiture of the Estate of the Wife. *15 E. 4. 29. 6.*

A Statute-Merchant was made by Baron and Feme, and they join in a Defeazance; this shall not be the Defeazance of the Wife. *48 E. 3. 12.*

In Cases of Limitation of Estates, as if Limitation be, if a Ring be tendred by a Woman *In Cases of Limitation.* that the Land shall remain to her, and she takes an Husband, and after she and the Husband tender the Ring, this shall be a sufficient Tender, and shall be intended the Act of the Wife.

If Baron and Feme join in a Fine of the Wife's Land, the Wife alone without the Husband may declare the Uses of it. *Beckwith's Case, 2 Co. 27.* *Declaring the Uses of a Fine.*

Many Acts in *Pais* made by the Baron and Feme, shall be intended the Act of the Wife; as Agreement to the Use of a Fine, which shall bind the Wife after the Death of the Husband.

Baron and Feme grant a Rent for Equality of Partition, this shall bind the Wife after the Death of the Husband, for it is her Act as well as the Act of her Husband, and shall be intended for her *Rent by Owelty of Partition.*

Condition to
reinfeoff.

her Benefit: Feoffment of a married Woman on Condition to reinfeoff, and she with her Husband makes the Feoffment, it is good. A Woman Lessor *pur vie* with her Husband attorns upon the Grant of a Reversion; it is good, and shall bind the Wife after the Death of the Husband.

Attorn.

Assent of the
Wife to a Re-
vocation.

If an Estate be conveyed with Power that the Husband with the Assent of the Wife may revoke, the Assent of the Wife to such Revocation is good. So if the Proviso be, that a married Woman, without the Assent of her Husband, may make a Revocation of Uses and declare new, this is good. 2 *Brownl.* 139, 140.

Acknowledg-
ment of a
Deed to be in-
rolled.

Where the Wife is examined by Writ she shall be bound, otherwise not. 10 Co. 43. Baron and Feme acknowledge a Deed to be intolled, this doth not bind her because she is not examined by Writ.

Payment to a
Feme Covert.

Debt on an Arbitration Bond. The Defendant pleaded, the Arbitrator had awarded that the Defendant should pay to the Plaintiff 10 l. and said he had paid it to the Plaintiff's Wife; who received it; upon which the Plaintiff did demur. Judgment *pro Quer.* For Payment to her was not good. 1 *Leon.* 320. *Froud and Batt's Case.*

For what Acts or Torts of the Wife the Husband shall be punished. Et econtra. Vide Tit. Action and Tit. Waste.

Waste.

If a Lease be made to Baron and Feme, and the Baron doth Waste and dieth, if the Wife agree to the Estate, she shall be punished for the Waste done by the Husband, in like Manner as if a Stranger had done the Waste; after the Death of the Husband she is in from the

the Lessor; and if the Action had been brought against the Baron and Feme, the Waste should have been *quod fecerunt vastum*; so as it is as well the Waste of the Wife, as of the Husband. 2 *Inst.* 303.

Paraphernalia.

By our Law the Apparel of the Wife is called *Bona Paraphernalia*. The Wife by the Common Law ought to have her necessary Apparel for her Body after the Death of the Husband, and not the Executors of the Husband; but she shall not have excessive Apparel.

If the Husband deliver to his Wife a Piece of Cloth to make a Garment, and dies, albeit it was not made into a Garment in the Life of the Husband, yet the Wife shall have it, and not the Executor, inasmuch as it was delivered to her to that Intent. But against the Debtee of the Husband the Wife shall have no more Apparel than is convenient. *Mich.* 40 & 41 *Eliz.* *Harwel's Case*.

A Chain of Diamonds and Pearls being worth 370 *l.* being usually worn by a Woman who was the Daughter of an Earl in *Ireland*, and a Baron of *England*, and the Wife of a Knight and the King's Serjeant at Law, shall be *Bona Paraphernalia*; so that the Husband cannot devise them from the Wife. *Cro. Car.* 343. The Lord *Hastings* and *Dowglass*. *Richardson* and *Crook* thought the Wife shall not have them as *Bona Paraphernalia*, because they were not necessary for her, but only convenient: *Jones* and *Berkly* *econtra*: But all agreed she shall have her necessary Apparel.

A Woman, by her Marriage Articles, agrees to have no Part of the Husband's personal Estate,
but

but what he should give her by Will, this bars her of her *Paraphernalia*. *Per Cur. 2 Vern. 83.*

The Husband devised the Wife's Jewels to her for Life, the Remainder over to his Son; one Point of the Case was, whether they should go to the Administrator of the Wife, being her *Paraphernalia*; and though it was agreed, that where a Husband dies intestate, or does not by Will dispose of the Jewels of his Wife, she may claim them (in Case there be no Debts); yet as he may devise them, and as he in this Case has given them to her for Life only, and she has not made any Election or Claim to them as her *Paraphernalia*, they cannot go to her Administrator. *2 Vern. 246, 247.*

What Things or Actions the Wife shall have after the Death of the Husband.

What Actions } Real.

What Things } Personal.

The Wife shall have Trespass after the Death of the Husband for Trees cut upon the Land during the Coverture. *18 E. 4. 13. 39 H. 6. 45.*

If the Husband pull down an House which he had in Right of his Wife, and gives the Timber, the Wife shall not have an Action for it after the Death of the Husband. *43 E. 3. 26. b.*

A. purchases a Walk in a Chase, and takes the Parent to himself, and to his Wife, and J. S. during their Lives, and the Life of the Survivor; the Husband dies indebted, yet the Wife was decreed the Benefit of the Parent during her Life, for she cannot be a Trustee for her Husband; but after her Death J. S. is to be a Trustee for the Husband's Executor. *Trin. 1688. between Kingdome and Bridges, 2 Vern. 67.*

Rose Edmonds brought Trespass against *P.* for putting in his Beasts into her Land, 1 *Maii*, *continuando usque January*: On Not guilty, the Plaintiff had Judgment. Error was brought, and Error in Fact was, that *Rose Edmonds* was *covert de Baron* the first Day of *May*, and so for a Week after, and her Husband being dead it is gone with his Person; and Damages were given entirely. *Per Curiam*: It is Error.

What Things personal. Vide Acceptance.

If an Obligation be made to Baron and Feme, *Bond.* the Feme shall have it by Survivor if she will. 4 *H. 6. 6.* 10 *Car. in Cam. Scaccar'*, *Spark* and *Fairman's Case.*

So the Wife shall have a Recognisance by Sur- *Goods.* vivor; but if the Goods are given to Baron and Feme, the Feme shall not have them by Survivor, but the Executors.

A Feme Covert purloined her Husband's *Monies pur-* Goods or Money, and put the Money into o- *loined.* ther Men's Hands, who therewith buy Lands to her Use; if the Heir or Executor of the Husband do sue in Equity for Relief, or to have the Land or Money restored, yet denied Relief; for said *Egerton* Chancellor, he would not relieve the Heir or Executor, (nor the Husband himself if he were alive,) for he sat not there to relieve Fools or Buzzards, who could not keep their Money from their Wives.

By a Marriage Settlement, a Term is created for raising 20 *l. per Ann.* as Pin-money, for the Wife's separate Use, which is constantly paid her by the Husband's Steward, except the last Year before the Husband's Death; there being but one Year in Arrear only, it shall be paid; but it would be otherwise if it had been

been in Arrear several Years. *Trin. 1691, between Offley and Offley.*

The Plaintiff's Relation (to whom he was Heir) allowed his Wife Pin-money, which being in Arrear, he gave her a Note to this Purpose; *I am indebted to my Wife 100 l. which became due to her such a Day*; after by his Will he makes Provision out of his Lands for Payment of all his Debts, and all Monies which he owed to any Person in Trust for his Wife and the Question was whether the 100 l. was to be paid within this Trust; and my Lord Keeper decreed not, because in Point of Law it was no Debt, because a Man cannot be indebted to his Wife; and it was not Money due to any in Trust for her. *Hill. 1701. between Cornwall and Earl of Mountague.*

If a Woman had Pin-money, or a separate Maintenance settled on her, and she by Management or good Housewifry, saves Money out of it, she may dispose of such Money so saved by her, or of any Jewels bought with it, by Writing in Nature of a Will, if she die before her Husband, and shall have it her self, if she survive him, and such Jewels, &c. shall not be liable to the Husband's Debts, *Pasch. 1692 between Herbert and Herbert*; and the Precedent of Sir Paul Neal's Case cited to the same Purpose; the Wife allowed what she had saved out of her Pin-money, against the Devisee of the Real Estate. *Mich. 1694. between Miles and Wikes.*

A Woman, on her Marriage, reserves to herself a Power of disposing of her Personal Estate as she thinks proper, all that she dies possessed of is to be taken to be her separate Estate, or the Produce of it, unless the contrary can be made appear; and as she has a Power

over

over the Principal, so she may dispose of the Produce or Interest. *Hill. 1705. 2 Vern. 535. 2 Vern. 245. S. P.* where it is said, that there had been several Decrees ratifying such Disposition.

A Baron and Feme have a Decree for Money, in the Right of the Feme, and then the Baron dies, the Benefit of the Decree belongs to the Feme, and not to the Executor of the Husband; certified by *Hyde*, Chief Justice, and his Certificate confirmed by my Lord Chancellor. *Mich. 15 Car. 2. between Nanney and Martin, Chanc. Ca. 27.*

Money is left in Trustees Hands for the Benefit of a Feme Covert, and the Husband dies, it shall go to the Feme, and not to the Executors of the Husband, he having made no Disposition of it in his Life-time. Decreed *Pasch. 1683. between Twisden and Wife, 1 Vern. 161.*

The Husband, in Consideration of 500 *l.* Portion, Part in Lands, and Part in Bonds, owing to the Wife, settles a Jointure of 45 *l.* per Ann. and the Husband dying before any Fine levied of the Lands, or Alteration of the Bonds, the Creditors of the Husband sue the Widow, and the Executor of the Husband; and it was held, though there was not sufficient Personal Estate besides, that as these Securities remained unaltered, and as the Law had cast them upon the Widow, Equity could not take them from her; though it was urged, that the Wife had a Jointure settled on her adequate to the Portion. *Trin. 1688. between Lister and Lister, 2 Vern. 68.*

A Man marries a Woman intitled to a Mortgage in Fee, and after Marriage assigns his Interest in the Mortgage to Trustees, to call in

the Money, and lay it out in Land to be settled on the Husband and Wife, and their Issue, Remainder to the Heirs of the Husband and the Husband and Wife die without Issue this Mortgage being a *Chose in Action* shall go to the Executor of the Wife, and not to the Executor of the Husband. Decreed *Mic.* 1700. between *Burnet* and *Kinnaston*, 2 *Ver.* 401.

A. being indebted to a Feme Covert, becomes a Bankrupt, the Husband pays the Contribution, and dies before any Distribution, and then the Wife died; and it was held, that the Executors of the Wife were intitled to the Dividend; for the Husband paying Contribution does not alter the Property of the Bond. 2 *Ver.* 707.

A Husband lends out Money in the Names of himself and his Wife, upon Mortgages and Bonds, and dies, the Wife is intitled to the Money by Survivorship, if there are sufficient Assets besides, to pay the Husband's Debts. *Trin.* 1711 between *Christ's Hospital* and *Ludgin*, 2 *Ver.* 683.

The Plaintiff's Grandfather was Tenant for Life of a Farm, and the Inheritance was in the Plaintiff's Father, to whom he is Heir, on the Marriage of the Plaintiff's Father with the Defendant, who had a Portion of 300 *l.* in her Brother's Hands, and secured by his Bond to her; the Father and Grandfather join in settling this Farm on the Defendant for her Jointure and this Settlement is expressed to be made in Consideration of 100 *l.* paid to the Grandfather, for the Marriage Portion of the Defendant, which 100 *l.* was paid to him accordingly by her Brother; the Marriage took Effect and the Defendant's Husband died indebted in several

veral Bonds, wherein he and his Heirs were bound; and Actions were brought against the Plaintiff, as his Heir, on the said Bonds, to subject the Real Estate descended to the Payment of them; and he brought his Bill to have the remaining 200 *l.* of the Portion applied in Discharge of those Debts, which was decreed by the Master of the Rolls; but upon an Appeal by my Lord Chancellor, the Decree was reversed, and held, that it survived to the Wife, though he said, that if the Settlement had been in Consideration of the whole Portion, and had been equivalent to it, it must have gone to discharge the Husband's Debts. *Mich. 1697. between Cleland and Cleland.*

Things Real. Vide Acceptance. Vide Rent.

If a Lease for Years be made to Baron and *Lease for Years* the Feme shall have it by Survivor.

If a Feme seised of a Rent-Service, takes *Rent.* Husband, and after the Husband dies, the Wife shall have the Arrears incurred during the Coverture. 15 *E. 4. 10.*

If a Feme make a Lease for Life or Years, paying Rent, and after takes Husband, after Death of the Husband the Wife shall have the Arrears incurred during the Coverture, and the Executor of the Husband, because this is out of the Freehold.

If a Rent-Charge be granted to *A.* a Feme and *B.* for Years, and after they intermarry, after Arrearages incur, and after the Husband dies; the Wife shall have the Residue of the Rent, and also the Arrearages in the Writ of Annuity, for that they participate of the Nature of the Principal, and the Executor of

Of Baron and Feme's Interest. Ch. II.
 the Husband shall not have the Arrears. *M.*
22 Jac. B. R. Carew and Burgoine.

*What Things the Husband shall have after
 Death of the Wife.*

*Arrears of
 Rent.*

If a Feme having a Rent for Life takes Husband and dies, the Husband shall have the Arrears incurred during the Coverture, 10 *H. 6. 11, 12.* 4 *Co. Ognel's Case*: But he shall not have the Arrears incurred before the Coverture at Common Law, but by the Statute of 32 *H. 8.* he shall.

If a Feme make a Lease for Years, rendering Rent, and afterwards takes Husband, and dies, the Husband shall have the Arrears incurred during the Coverture. 13 *H. 6. 11.*

Presentation.

If Baron and Feme in the Right of the Wife are seized of an Advowson, and the Church is void, and after the Feme dies, yet the Husband shall present to this Church; for it cannot be granted over, yet it is not meerly in Action 1 *Inst. 120.* But otherwise of a Bond to the Wife; as if *J. S.* becomes bound to a Feme Covert, and she dies, her Husband shall not have this Obligation without Administration, for that it is a Thing in Action.

*Lease for
 Years.*

If the Husband be possessor of a Lease for Years of Land in the Right of the Wife, and after the Wife dies, the Interest of the Lease is presently vested in the Husband by Law, and he shall have it, and not the Administrator of the Wife. *Dyer 151. Plowd. 192. Wrotely and Adams, 1 Inst. 46.*

*Interest of a
 Term by the
 Performance
 of the Condi-
 tion.*

A Feme possessor of a Lease for Years takes Husband, and they join in the Grant of a Term, upon Condition that if they, their Executors or Administrators, pay 10 *l.* at such a Day

Day, it shall be lawful for them to re enter, and after the Wife dies, the Husband pays the 10 l. and enters, and dies, his Executors shall have the Term, and not the Administrator of the Wife; for that the Interest of the Term survives to the Husband. *Pasch. 12 Jac. B. R. Radford and Young.*

If a Term for Years be granted in Trust, the *Term in Trust.* Baron shall not have it. *Per Coke in Waterhouse's Case;* and agreeable to this it was decreed by *Finch, Lord Keeper, 1 Chanc. Cases 225.* but the Law is now changed in this Particular. For *A.* having disposed of a Term settled in Trust on his Wife by a former Husband; tho' it was decreed void by *Finch, Lord Keeper;* yet upon an Appeal to the House of Lords, the Decree was reversed. *Sir Edward Turner's Case, 1 Vern. 7.*

And it came afterwards in Question, upon an Assignment made by the Husband of such a Term, whether he could dispose of it; and it being urged, that it had been lately adjudged in the House of Lords that he might, my Lord Chancellor wondered at that Resolution, which he said would not amount to an Act of Parliament, so as to change the Law; but at last decreed such Disposition good; Saying there must not be one Kind of Equity above Stairs, and another here; and thought that from henceforth it would not be sufficient to have the Husband's Consent, and Privity to an Assignment of a Term, in Trust for the Feme before Marriage, unless he was likewise made a Party to the Assignment. *1 Vern. 18.*

A Term being settled in Trust on the Wife by a former Husband, the second Husband first mortgages it, and then he and the Mortgagee assign it to *J. S.* who brought a Bill a-

gainst the Wife and her Trustees, to have the legal Estate assigned over to him; and it was held, that the Husband may as well dispose of a Term in Trust for the Wife, as if the legal Estate was in her; and decreed accordingly although the Husband had made no Settlement on the Wife. *Trin. 1692. 2 Vern. 270.*

But upon an Intermarriage between *A.* and *B.* who has and Estate in Land, and a Fortune in Money, and who are both Infants, an Act of Parliament is obtained for settling a Jointure on *B.* the Wife, in Bar of Dower; provided that the Jointure shall cease, if the Wife, when of Age, does not settle her Land, &c. but nothing is said as to the personal Estate, and Part of the Fortune is a Mortgage of 1300 *l.* taken in a Trustee's Name, though when she came of Age, she settled her own Land only; yet the Husband dying, the Mortgage shall go to the Executors of the Husband, and shall not survive to the Wife as a *Chose in Action*. Decreed 1705, between *Blois* and Countess of *Hereford*, 2 *Vern.* 501. and my Lord Keeper laid it down as a Rule, that in all Cases where a Man makes a Settlement equivalent to the Wife's Portion, it shall be intended that he was to have the Portion, though there is no Agreement for that Purpose.

Note; This was a *Chose in Action* in Equity, and some Stress laid on that, though it does not appear by this Report.

If a Sum of Money is awarded to the Husband, which he is intitled to in Right of his Wife, and the Husband dies before it is paid, it will go to his Executors, and not survive to the Wife, the Award being a Sort of Judgment, which

Which has changed the Property. *Pasch. 1686.*
between *Oglander* and *Baston*, 1 *Vern.* 396.

A Man marries an Orphan of *London*, who
dies before Twenty-one, yet her Share shall
survive to the Husband, and shall not go to
her other Children. 1 *Vern.* 88.

One dies intestate, leaving a Daughter, the
Wife of *J. S.* and the Daughter dies before any
Distribution made, and the Husband dies in-
testate, the Share of the Daughter shall go to
her Administrator of the Husband, and not to
her Administrator; but the Reporter refers to
the Decree, *Mich. 1693.* between *Cary* and
Taylor, 2 *Vern.* 302.

Baron and Feme, Joint-tenants for their Lives;
Baron sows the Lands, and dies before Sever-
ance; and the Question was, whether the Wife
or Executor of the Husband should have the
Land? and the Court proposed, that each
should take a Moiety; which was agreed to.
Stoner's Case, 2 *Vern.* 322.

Richard Middleton, upon a Marriage Treaty
with *Barbara Wynn*, agrees, in Consideration
of 1250 *l.* Portion secured to her by Bond from
her Brother, to clear his Estate, being 70 *l.*
per Annum, of Incumbrances, within six Months
after the Marriage should be had; and for every
100 *l.* he should receive, to settle 10 *l. per*
Annum on her for a Jointure, and to settle
Lands on the first and other Sons of that Mar-
riage: *Barbara* was no Party to these Articles;
the Marriage takes Effect; *Barbara* dies with-
in the six Months, without Issue; *Richard*, on
a second Marriage with one *Dorothy* ———
who had a Portion of 1600 *l.* in Trustees
Hands, by Articles agrees to lay out 1250 *l.* he
was intitled unto in Right of his first Wife;
and this 1600 *l.* when received, in the Pur-
chase

chase of Lands, to be settled on *Dorothy*. for a Jointure, and for a Provision for the Issue of that Marriage; which Marriage after takes Effect, and then *Richard* dies before he had got in either of the Portions: And my Lord Keeper decreed it to the Representatives of *Richard*, and that it should not survive to the Administrator of the first Wife, he being a Purchaser by his Agreement to disincumber his Estate; and being in no Default, the Wife dying within the six Months, which prevented the making the Settlement. *Pasc.* 1711. between *Meditb* and *Wynn*.

A. made a Settlement, whereby he created a Term for Years, in Trust to raise 400 *l.* a-piece for his two Daughters; one of them marries *B.* and he and his Wife brought a Bill, and had a Decree to have the 400 *l.* raised and paid; but before it was raised, *B.* assigns the Benefit of this Decree to one *J. S.* in Trust for Payment of his Debts, and made him Executor, and died, leaving his Wife and one Child unprovided; the Creditors brought a Bill to have the Benefit of the said Assignment; and though it was insisted upon, in Behalf of the Wife, that there was a Difference between a Term in Trust to raise a Sum of Money for a Woman, and a Trust of the Term itself for a Woman; yet the Master of the Rolls held, that this was a Term for Years, and not a Sum of Money, and therefore not to be distinguish'd from Sir *Edward Turner's* Case (above); and must decree it, (though against his Conscience) That there may be an Uniformity of Judgments. *Trin.* 1703. between *Walter* and *Saunders*.

What

What Things the Wife may make good after the Death of her Husband, or not.

If a Bond be made to Baron and Feme, the *Bond*.
Feme may refuse this after the Death of the Baron. 4 H. 6. 6. And by such Waver this is made an Obligation to the Husband only.

If Baron and Feme join in a Lease for Life *Lease for Life*,
of the Land of the Wife, rendring Rent, the *for Years*.
Feme may make this good by Agreement, after the Death of her Baron, and shall have the Rent. 10 H. 6. 4. So of a Lease for Years.
Side Lease for one and twenty Years, or three lives by the Statute, *infra*.

C H A P. X.

Tenant by the Courtesy.

The Nature of Tenancy by the Courtesy. Of what Estate a Man shall be Tenant by the Courtesy, or not. If he shall be Tenant by the Courtesy of an Estate in Suspence, or not. In what Cases the Husband shall be Tenant by the Courtesy, where the Wife's Estate is defeasible by Condition. Four Things belong to a Tenant by the Courtesy. What Seisin of the Wife it must be to make the Husband Tenant by the Courtesy. In what Cases a Man shall be Tenant by the Courtesy of a Seisin in Law. How a Man shall be Tenant by the Courtesy in respect of the Issue, and how he must plead the having of Issue.

TENANT by the Courtesy of *England*, is where a Man taketh a Wife seised of Lands in Fee-simple, or in Fee-tail general, or seised as Heir in Tail special, and hath Issue Male or Female by the same Wife born alive, though the Issue after dieth or liveth; yet if the Wife die, the Husband shall hold the Land during his Life by the Law of *England*.

Of what Estate a Man shall be Tenant by the Courtesy, or not.

Regula.

It is laid down as a Rule by *Littleton*, Sect. 52. That in every Case where a Man taketh a Wife seised of such an Estate of Tenements, &c. as the Issue which he hath by his Wife, may by Possibility inherit the same Tenements, of such Estate as the Wife hath, as Heir to the Wife :

Wife: In this Case, after the Decease of the Wife, he shall have the same Tenements by the Courtesy of *England*, otherwise not. If Lands be given to a Woman, and to the Heirs Males of her Body, she taketh an Husband, and hath Issue a Daughter, and dieth; he shall not be Tenant by the Courtesy, because the Daughter by no Possibility could inherit the Mother's Estate in the Land; and therefore if a Woman, Tenant in Tail general, maketh a Feoffment in Fee, and taketh back an Estate in Fee, and take a Husband, and hath Issue, and the Wife dieth; the Issue in a *Formedon* may recover the Land against his Father, because he is to recover the Land by Force of the Estate-tail, as Heir to his Mother, and is not inheritable to his Father. If a Man taketh a Wife seised of Lands and Tenements in Fee, and hath Issue, and after the Wife is attainted of Felony, so as the Issue cannot inherit to her; yet he shall be Tenant by the Courtesy, in respect of the Issue which he had before the Felony, and which by Possibility might have inherited; but if the Wife had been attainted of Felony before the Issue, albeit he hath Issue afterwards, he shall not be Tenant by the Courtesy.

If an Estate of Freehold in Seigniories, Rents, Commons, or such like, be suspended, a Man shall not be Tenant by the Courtesy; but if the Suspension be but for Years, he shall be Tenant by the Courtesy: As if the Tenant make a Lease for Life of the Tenancy to the Seigniories, who taketh an Husband and hath Issue, the Wife dieth, he shall not be Tenant by the Courtesy; but if the Lease had been made but for Years, he shall be Tenant by the Courtesy.

No Tenancy by the Courtesy of an Estate suspended.

If

If a Woman, Tenant in Tail general, taketh an Husband, and hath Issue, which Issue dieth and the Wife dieth without any other Issue yet the Husband shall be Tenant by the Courtesy, albeit the Estate in Tail be determined because he was intitled to be Tenant *per Legem Angliæ*, before the Estate in Tail was spent, and for that the Land remaineth. But if a Woman make a Gift in Tail, and reserve a Rent to her and her Heirs, and the Donor take Husband, and hath Issue, and the Donor dies without Issue, the Wife dies, the Husband shall not be Tenant by the Courtesy, because the Rent newly reserved, is by Act of God determined, and no Estate thereof remaineth: *Aliter*, if a Man seised in Fee of a Rent makes a Gift in Tail general to a Woman, &c. 1 *Inst.* 30.

A Woman taketh Husband, and hath Issue, Lands descend to the Wife, the Husband enters, and after the Wife is found an Ideot by Office, the Lands shall be seised by the King; for the Title of the Tenancy by the Courtesy, and of the King, being at one Instant, the Title of the King shall be preferred.

A Man shall be Tenant by Courtesy of a Castle.

A Man shall be Tenant by Courtesy of Common *sans nombre*.

Regula.

A Man shall not be Tenant by the Courtesy of a bare Right, Title, Use, or of a Reversion, or Remainder expectant upon any Estate of Freehold, unless the particular Estate be determined or ended during the Coverture.

In what Case the Husband shall be Tenant by the Courtesy, where the Wife's Estate is defeasible by Condition.

The Mother, being seised of certain Lands, had Issue two Daughters, and by Indenture covenanted to stand seised to the Use of *E.* her eldest Daughter in Tail, on Condition that the said *E.* should pay to her other Daughter, within a Year after the Death of the Mother, or within a Year after the other Daughter should come to the Age of eighteen Years, 300 *l.* and if *E.* should fail in the Payment of the said Sum, or shall die without Issue before such Payment, then to the Use of the said second Daughter in Tail. The Mother dies, *E.* takes Husband, hath Issue, and afterwards dies *sans* Issue, before the Day of Payment, the Husband shall be Tenant by the Courtesy: For as to the Condition of the Payment of the said Sums, the same is not determined; for she died *sans* Issue before the Day of Payment, *viz.* before the second Daughter came of the Age of eighteen Years, and as to that there is no Condition broken: And as to the Point of dying without Issue, the same is not a Condition, but rather a Limitation of the Estate; and the same is no more than what the Law saith, and the Estate-tail is spent and determined by dying *sans* Issue, and doth not cease, nor is cut off by any Limitation. 1 *Leon.* 167. *Sams* and *Pain's* Case.

A Man is intitled to be Tenant by the Courtesy, and maketh a Feoffment in Fee upon Condition, and entreth for the Condition broken, and then his Wife dieth; he shall not be Tenant by the Courtesy, because albeit the Estate given
by

by the Feoffment be conditional, yet his Title to be Tenant by the Courtesy was inclusively absolutely extinct by the Feoffment; for the Condition was not annexed to it.

The Husband shall be Tenant by the Courtesy of the Wife's Gavelkind Lands, whether he hath Issue by her or not. *Co. 1 Inst. 110.* An Alien cannot be Tenant by the Courtesy.

Now four Things do belong to an Estate of Tenant by the Courtesy.

1. *Marriage.*

The Custom of a Manor was, That if any Man taketh to Wife any customary Tenant, and hath Issue, and shall outlive his Wife, he shall be Tenant by Courtesy, and pleads he took to Wife *Anne*, to whom, during the Coverture, a customary Tenement did descend, and had Issue; by this Custom he shall not be Tenant by Courtesy, for *Anne* was not a customary Tenant at the Time of Marriage. *2 Leon.* Sir *John Savage's Case.*

2. *Seisin of the Wife.*

Now there is a twofold Seisin, a Seisin in { Deed,
Law.

And the Seisin of the Wife is intended a Seisin in Deed: As if a Man died seised of Lands in Fee-simple, or Fee-tail general, these Lands descend to his Daughter, and she taketh Husband, and hath Issue, and dies before any Entry, the Husband shall not be Tenant by the Courtesy; and yet in this Case she had a Seisin in Law: But if she or her Husband had, during her Life, enter'd, he had been Tenant by the Courtesy. *1 Inst. 29.* Except the Wife be actually seised, the Heir shall not make himself Heir to the Wife; and that is

The Reason that a Man shall not be Tenant by the Courtesy of a Seisin in Law.

But in some Cases a Man shall be Tenant by the Courtesy of a Seisin in Law; as if a Man seised of an Advowson, or Rent in Fee, hath Issue a Daughter, who is married and hath Issue, and dies seised, the Wife, before the Rent became due, or the Church became void, dieth; he had but a Seisin in Law, and yet he shall be Tenant by the Courtesy, because he could by no Industry attain to any other Seisin, *Et impotentia excusat Legem.*

The Tenant took the Seignoress to Wife, and had Issue, the Wife died, the Husband shall not be Tenant by Courtesy; for although the Seignory was in her at the Time of the Marriage, yet by Priority in Law it ceased, so as no Seisin of the Seignory was during the Coverture. *Ed. 3. 6.*

A Baron shall not be Tenant by Courtesy of Copyhold, unless there be a Custom to warrant it. *Cro. Eliz. 361.*

3. *Issue.*

If a Man seised of Lands in Fee hath Issue a Daughter, who taketh Husband and hath Issue, the Father dies, the Husband enters, he shall be Tenant by the Courtesy, although the Issue was had before the Wife was seised; and so it is, tho' the Issue had died in the Life-time of her Father, before any Descent of the Land, yet shall he be Tenant by the Courtesy.

If a Woman seised of Lands in Fee taketh Husband, and by him is big with Child, and in her Travail dies, and the Child is ript out of her Body alive, yet shall he not be Tenant by the Courtesy, because the Child was not born during the Marriage, nor in the Life-time of the
H Wife,

Pleading.

What shall be
said lawful
Issue.

Wife, but in the mean Time the Land descend-
ed; and in Pleading he must alledge, that he
had Issue during the Marriage.

If the Issue be born deaf or dumb, or both,
or be born an Idiot; yet it is a lawful Issue to
make the Husband Tenant by the Courtesy, and
to inherit the Land.

And if the Issue be born alive, it is sufficient,
though it be not heard cry. 8 Co. 34. *Pain's*
Case; For the Crying is but a Proof that the
Child was born alive, and so is Motion, Stir-
ring, or the like.

4. Death of the Wife.

Yet it is not necessary that these four should
concur all together at one Time; and therefore
if a Man taketh a Woman seised of Land in
Fee, and is disseised; and then have Issue, and
the Wife die, he shall enter and hold by the
Courtesy: So if he hath Issue, which dieth be-
fore the Descent.

And though the Estate be not consummate
till the Death of the Wife, yet the Estate hath
such a Beginning after Issue had in the Life of
the Wife, as is respected by Law for divers Pur-
poses; as after Issue had, he shall do Homage
alone; and if after Issue had, the Husband
makes a Feoffment in Fee, and the Wife dieth,
the Feoffee shall hold it during the Life of the
Husband; and the Heir of the Wife shall not,
during his Life, recover it in a *sur cui in vita*;
for it could not be a Forfeiture; for that the
Estate at the Time of the Feoffment was an
Estate of Tenancy by the Courtesy initiate,
and not consummate.

By Noy, in his Lecture, it is said to be ad-
judged, 36 *Eliz.* Feme Tenant in Tail acknow-
ledgeth a Statute, and taketh Husband, and hath
Issue

Issue and dies, the Lands may be extended in the Hands of Tenant by the Courtesy, and in the Hands of the Issue in Tail, if the Tenant by the Courtesy surrender during the Life of Tenant by the Courtesy. *Dyer 51. b. in Margine.*

Tenant by the Courtesy grants his Estate with Warranty, and comes in as Vouchee, yet shall have Aid of him in the Reversion. *Hob. 21.*

Pleading.

In Pleading, he must alledge he had Issue during the Marriage, and upon that Point the Trial is to be had; and upon the Evidence it must be proved, that the Issue was alive; for *mortuus exitus non est exitus*: Proofs are, Crying, Motion, Stirring, &c.

Et sic seisu' existen' habuer' exitum inter eos quendam A. & postea & ante, &c. ead. M. apud A. præd' obiit, & prædict. (Baron) ipsam supervixit & se tenuit intus in præd. &c. Et fuit inde solus seisitus in dominico suo ut de libero tenemento ut tenens inde per legem Angliæ quousque, &c.

C H A P. XI.

Dower.

The Nature of Dower. Qualifications of the Wife to enable her to have Dower. What Divorce shall avoid Dower or not. Of the Endowment of a Wife de facto & de jure. What Seisin the Husband must have to make the Wife dowable. Of what Seisin of the Husband the Wife shall not be endowed. Of what Estate a Woman shall be endowed. Of what Inheritances intire, and not deviseable, she shall be endowed, and after what Manner. In what Cases of Lands or Tenements, which are deviseable, and which the Heir of the Husband shall inherit, yet the Wife shall not be endowed. How she shall be endowed of improved Lands. If she shall be endowed of Lands mortgaged. For and in what Respect of Disabilities a Woman shall not be endowed. Where the Wife shall lose her Dower by the Attainder of her Husband, or not. Whether an Alien Woman shall be endowed, and how. What Act of the Wife shall bar her Dower. Several Cases of Elopement and Divorce relating thereunto. Assignment of Dower, by whom and how to be made. What Assignment of Dower is against common Right, or not. What Things may be assigned in lieu of Dower. Of Endowments by Metes and Bounds. Assignment of Dower by the Sheriff, and how. By the Heir. Assignment in Chancery. Of the Tenant in Dower having Damages. What Charges made by the Husband the Wife endowed shall avoid, or not. The Writ and Declaration in Dower. Pleadings in Dower. What

What Pleas are good, or not, in Bar of Dower. Trial, Evidence, Issue in Dower. Damages, Judgment, and Execurion of the rationabili parte bonorum, according to the Custom of London.

WHere a Man is seised of certain Lands or Tenements in Fee-simple, or Fee-tail general, or as Heir in Tail special, and taketh Wife, and dieth, the Wife, after her Husband's Decease, shall be endowed of the third Part of such Lands or Tenements as were her Husband's at any Time during the Coverture, whether she has Issue by her Husband or not. *Tenancy in Dower, what.*

Qualifications of the Wife to enable her to her Dower.

She must be of nine Years of Age at the Death of her Husband, else she shall not be endowed: But if one take a Wife 100 Years old, she shall be endowed. She shall not be an Alien, nor one that elopes. *Vide infra.*

Three Things are necessary to the Consummation of Dower.

1. Marriage.
2. Seisin.
3. Death of the Husband.

1. *Marriage.* This must continue during the Coverture; for if that be dissolved, Dower ceaseth; and yet this is to be understood when Husband and Wife are divorced *a vinculo matrimonii*, as in Case of Precontract, Consanguinity, Affinity, &c. and not *a mensa & thoro*, as for Adultery.

If a Marriage *de facto* be voidable by Divorce, in respect of Consanguinity, Precontract, Affinity, &c. yet if the Husband die before Divorce, the Wife shall be endowed; but if they are divorced *a vinculo matrimonii* in the Life of her Husband, she loseth her Dower; *aliter*, if they were divorced *causa adulterii*.

Wife *de facto*
and *de jure*.

It is to be understood of a Wife *de facto*, as well as *de jure*; and therefore if the Wife be past the Age of nine Years at the Time of the Death of the Husband, she shall be endowed, let the Husband be of never so young an Age. Though the Woman cannot consent before Twelve, nor the Man before Fourteen, yet their imperfect inchoate Marriage, from the which either of the said Parties at the Age of Consent may disagree, after the Death of the Husband shall give Dower to the Wife; and therefore, after the Death of the Husband, it is in Law accounted *legitimum matrimonium quoad dotem*.

If a Man take a Wife of the Age of seven Years, and after aliens his Land, and after Alienation the Wife attains the Age of nine Years, she shall be endowed, for she was conditionally dowable at the Time of her Marriage, (*viz.*) If she attained the Age of nine Years before the Death of the Husband. *Inst.* 33.

Seisin in Law.

2. *Seisin*. The Husband must be seised either in Deed or in Law, during the Coverture, or else she shall not be endowed, where Lands and Tenements descend to the Husband: Now before Entry he hath but a Seisin in Law, and yet the Wife shall be endowed, albeit it be not reduced to an actual Possession; for it lies not in the Power of the Wife to bring it to an actual Seisin, as the Husband may do of the

The Wife's Land when he is to be Tenant by the Courtesy.

Grandfather, Father and Son, and the Grandfather is seised of three Acres of Land in Fee, and taketh Wife and dieth, this Land descendeth to the Father, who dieth either before or after Entry, now is the Wife of the Father dowerable: The Father dieth, and the Wife of the Grandfather is endowed of one Acre, and dieth, the Wife of the Father shall be only endowed of the two Acres residue; for the Dower of the Grandmother is paramount to the Title of the Wife of the Father, and the Seisin of the Father which descended to him (be it in Law, or actual) is defeated; and in that Case *Dos de dote peti non debet.*

It is not necessary that the Seisin should continue during the Coverture, as the Marriage must; for albeit the Husband aliens the Lands and Tenements, or extinguisheth the Rent, or aliens, &c. the Wife shall be endowed.

And yet of every Seisin the Wife shall not be endowed, as in these Cases following.

The Wife shall not be endowed of the Seisin of her Husband, had by Inter-union of the King's Possession.

The Woman shall not be endowed both of the Land given in Exchange, and of the Land taken in Exchange, and yet the Husband was seised of both; but she may have her Election to be endow'd of which she will.

Of a Seisin in an Instant a Woman shall not be endow'd. If the Conusance of a Fine doth grant and render the Land to the Conusor, the Wife of the Conusor shall not be endow'd.

Inst. 31. b.

Of what Seisin the Wife shall not be endowed.

What Seisin it is that intitles the Wife to her Dower.

1. He must be sole seised thereof, and not in Joint-tenancy: If there be two Joint-tenants in Fee, and one makes a Feoffment in Fee, his Wife shall not be endow'd.

Regula.

2. He must be seised of such an Estate during the Coverture, that the Child that he shall beget of the said Wife may by Possibility inherit the said Lands.

And yet this is not a general Rule. If a Man be Tenant in Fee-tail general, and maketh a Feoffment in Fee, and taketh back an Estate to him and his Wife, and to the Heirs of their two Bodies, and they have Issue, and the Wife dies, the Husband taketh another Wife and dies, the Wife shall not be endow'd; for during the Coverture he was seised of an Estate-tail special, and yet the Issue, which the second Wife might have, by Possibility may inherit. The same Law it is, if he had taken back an Estate in Fee-simple, and after had taken Wife, and had Issue by her, yet she shall not be endow'd; for that the Fee-simple is vanish'd by the Remitter, and her Issue hath the Land by Force of the Intail. But in this Case, the Tenant cannot plead that the Husband was never seised of such an Estate, whereof the Demandant might not be endow'd, but he must plead the special Matter.

3. *Death of the Husband.* It must be a natural, not a civil Death.

Note; It is not requisite that Marriage, Seisin, and Age concur together all at one Time, but it is sufficient if they happen during Coverture.

If a Man seised of Lands in Fee taketh a Wife of eight Years old, and alieneth his Land,
and

and afterwards the Wife attaineth nine Years, and then the Husband dies, the Wife shall be endow'd; for though at the Time of Alienation the Wife was not dowable, yet forasmuch as the Marriage and Seisin in Fee was before the Alienation, and the Title of Dower is not consummate till the Death of the Husband, she shall be endow'd.

Broughton and Randal's Case was a little odd. The Title of the Wife to recover Dower was, That the Father and Son were Joint-tenants to them and the Heirs of the Son, and they were both hanged in one Cart; but because the Son, as was deposed by Witnesses, survived, as appeared by some Tokens, viz. the Shaking his Legs; his Wife thereupon demanded Dower, and had it upon the Issue *unque Seisie que Dower*. *Co. Eliz.* 502.

When the Father and Son die, so that no Proof can be made which died first, the Civil Law presumes that the Son survived; this being most agreeable to the Course of Nature.

Of what Estate a Woman shall be endowed.

Of every Estate of Freehold, and Inheritance in Fee-simple, Fee-tail general, or as Heir in Tail special, whereof her Husband was seised during the Coverture, either in Deed or Law, except as before.

Of an Estate-tail in Lands determined a Woman shall be endow'd, in the like Manner and Form as a Man shall be Tenant by the Courtesy, *mutatis mutandis*. *Estate-tail determined.*

She shall be endow'd of a Castle that is only maintained for the private Use and Habitation of the Owner. *Castle.*

She shall be endow'd of a principal Mansion, or capital Messuage, *Si non sit caput Baron', seu suage. comitatus.* *Capital Mes-*
Though

Inheritance
entire.

Though by many Inheritances that be entire whereof no Division can be made by Metes and Bounds, a Woman cannot be endowed of the thing itself, yet the Woman shall be endowed thereof in a special and certain Manner; as,

Mill.

Of a Mill a Woman shall not be endowed by Metes and Bounds in Common with the Heir, but either she may be endowed of the third Toll-dish, or *de integro mulendino per quemlibet tertium mensem.*

In *Gilpin and Cookson's Case* in C. B. was *quod recuperet tertiam partem mulendini*, and not of the third Toll-dish; and it is well enough, the Writ being of the Inheritance, and not of the Profits; for on Recovery of the third Part of the Mill she shall have the Toll-dish; and so is 1 *Inst.* 32. to be intended. 2 *Keb.* 8.

Stallage.
Fair.

A Woman shall be endowed of the third Part of the Profits of Stallage; of the third Part of the Profits of a Fair; of a third Part of the Profits of the Office of the Marshall's; of the third Part of the Profits of keeping a Park; and of a third Part of the Profits of a Dove-house; and of the third Part of the Profits of a Piscary (*viz.*) *Tertium piscem, vel gustum retis tertium.*

Parker'ship.
Dove-house.
Piscary.

Third Presenta-
tion.

She shall be endowed of the third Presentation to an Advowson.

Courts.
Heriots.
Fines.
Tithes.

She shall be endowed of the third Part of the Profits of Courts, Fines, Heriots.

She shall be endowed of Tithes, and the surest Endowment of Tithes is of the third Sheaf, for what Land shall be sown is uncertain.

Inheritances
devisable what
she shall not be
endowed of.

In some Cases of Lands and Tenements which are devisable, and which the Heir of the Husband shall inherit, yet the Wife shall not be endowed. As if the Husband makes a Lease for Life of certain Lands, reserving a Rent to him and his Heirs, and he taketh Wife and dieth, the

The Wife shall not be endowed; neither of the Reversion, though it be within the Word *Tene-
ments*, because there was no Seisin, in Deed or *Seisin*
Law, of the Freehold; nor of the Rent,
because the Husband had not but a particular
Estate therein, and no Fee-simple. But if the
Husband make a Lease for Years, reserving Rent,
and takes Wife, the Husband dies, the Wife shall
be endowed of the third Part of the Reversion
by Metes and Bounds, together with the third
part of the Rent.

If a Man makes a Gift in Tail, reserving a Rent.
Rent to him and his Heirs, and after the Donor
takes Wife and dieth, the Wife shall be endowed
of this Rent, because it is a Rent in Fee, and by
possibility may continue forever.

A Woman shall be endowed of a Common *Common*.
ertain; but of a Common *sans nombre* in Gros,
she shall not be endowed.

She shall not be endowed of a Common *sans
nombre*, for then the Land shall be doubly
charged. 11 Co. 45. Godfrey, Pusch. 9 Car. B. R.
Newet and Drake. Though in that Case in a
Court of Error Judgment was affirmed, because it
shall not be intended *Common sans nombre*, but
pendant.

She shall be endowed of a Rent service, Rent-
charge, Rent-seck.

Of an Annuity that chargeth only the Person, *Annuity*.
and issueth not out of any Lands or Tenements,
she shall not be endowed.

If the Freehold of the Rents, Common, &c. *Estate suspen-
ded*.
is suspended before the Coverture, and so
continues during the Coverture, she shall not be
endowed of them. But if after the Coverture
the Husband do extinguish them by Release or
otherwise, yet she shall be endowed of them;

for as to her Dower in the Eye of the Law, they are to have Continuance.

Land improved.

Of improved Lands she shall be endowed; if the Wife be entitled to have Dower of three Acres of Marsh, every one of the Value of 12 s. and the Heir by his Industry and Charge make it good Meadow, every Acre of the Value 10 s. the Wife shall have her Dower, according to the improved Value, and not according to the Value, as it was in her Husband's Time; for her Title is to the Quantity of the Land, viz. one third Part. So it is if the Heir improve the Lands by Building.

On the other side, if the Value be impaired in the Time of the Heir, she shall be endowed according to the Value at the Time of the Assignment, and not according to the Value, as it was in the Time of the Husband.

Of What Estate the Wife shall be endowed.

Regula.

It is a Rule: In every Case where a Woman takes an Husband seised of such an Estate in Tenements, &c. so as by Possibility it may happen that the Wife may have Issue by her Husband, and that the same Issue may by Possibility inherit the same Tenements of such an Estate as the Husband hath, as Heir to the Husband of such Tenements she shall have her Dower, otherwise not. As if Tenements are given to a Man and the Heirs which he shall beget on the Body of his Wife, in this Case the Wife has nothing in the Tenements, and the Husband hath but an Estate as Douce in special Tail; yet if the Husband die without Issue, the same Wife shall be endowed of the said Tenements, because the Issue, which she by Possibility might have had by the same Husband, might have inherited

had the same Tenements; but if such Wife
 doth, leaving her Husband, and after the Baron
 takes another Wife and dies, his second Wife
 shall not be endowed in this Case, for the Reason
 aforesaid. *Lit. Sect. 53.* And therefore though
 a Woman be a hundred Years old, and the Hus-
 band but fourteen Years old, and he dies, she shall
 be endowed, because the Law saith, if she be
 above nine she shall be endowed.

The Wife shall not be endowed of Lands and *Not of Joins*
 Tenements, which the Husband held jointly *tenancy.*

in another at the Time of his Death, for the
 joint-tenant claims all by Survivorship, which is
 not the Title of Dower; but Tenants in com-
 mon have several Freeholds and Inheritances,
 and their Moieties shall descend to their several
 Heirs, and therefore their Wives shall be en-
 dowed. *1 Inst. 37. b.*

A Feme shall be twice endowed, as in Case of
 Recovery by *Eigne Title.* *1 Rol. Abr. 684.*

If the Wife elope, she shall be barred of her *Elope.*
 Dower, and yet her Issue shall inherit.

If a Man seised in Fee of Land covenant to *Not of an E-*
 be seised of it to the Use of himself and his *state ended by*
 Wife, until C. his younger Son take a Wife, and *express Limi-*
 to the Use of C. and his Heirs, and after *tation.*

by which the Lands descend to B. his
 eldest Son, who had a Wife, and after dies, and
 at this C. takes a Wife, the Question upon a
 special Verdict was, If the Wife of B. the eldest
 shall be endowed of the said Estate of her
 husband? And the Court was divided in Opini-

on. But it seems she shall not be endowed,
 because his Estate is ended by an express Limi-
 tation, and consequently the Estate of the Wife
 derived out of it shall not continue longer
 than the original Estate. *Pasch. 10 Jac. B. C.*
and Ventrice.

Note;

Note; If Tenant in Fee takes a Wife, and makes a Lease for Years, and dieth, the Wife shall be endowed, and she shall avoid the Lease but after her Death the Lease shall be in Force again. 1 Inst. 46.

Dower by Release.

The Bargainee hath a Wife and dies, afterwards the Deed is enrolled, the Wife shall have Dower. *Baron Frevil's Case*, cited in *Flower and Baldwin's Case*, Cro. Car. 217. For by Relation the Bargainee was seised *ab initio*. Vide Cro. Jac. 615. *Amcot's Case*.

Not of a Fee gained in an Instant.

If Tenant in special Tail take a second Wife who is not dowable of the Tail, and afterwards makes a Feoffment in Fee and dies, his Wife shall not be endowed, for that he gains the Fee but in an Instant. 8 Co. 43.

The Husband ought to have a Fee or Tail and Franktenement in Possession, otherwise the Wife is not dowable.

Covenant to stand seised by Tenant in Tail.

The Husband of the Demandant and Father of the Tenant being Tenant in Tail, in Consideration of a Marriage with his Son, the Tenant in Tail covenanted that the Land after his Death should descend and come to his Son and his Heirs, and after he takes the Demandant to Wife: It was adjudged he was seised of such Estate, of which she was dowable, for that the Estate was altered by her Husband, for he was Tenant in Tail still as before. *Quare*, If it had been a Covenant to stand seised. Cro. Eli. *Blithman's Case*. Vide *Moor*.

J. S. seised in Fee by Indenture inrolled bargains and sells to the Husband for 120 l. In Consideration he shall redemise it to him and his Wife for their Lives under a Pepper-Corn and with Condition that if he paid the 120 l. at the End of twenty Years, the Bargain and Sale shall be void; he redemiseth it according

and dies; his Wife brought Dower. *Per Curiam*, Resolved in *Chancery*, that she shall have Dower, and a Court of Equity shall not preclude her of it; and when he redemisseth it upon the former Agreement, yet the Lessees are to receive it subject to this Title of Dower; and it was his Folly that he did not join another with the Bargainee, as it is the ancient Course in Mortgages.

If a Husband, before Marriage, conveys his Estate to Trustees and their Heirs, in such Manner as to put the legal Estate out of him, tho' the Trust be limited to him and his Heirs; yet the Wife shall not be endowed of this Trust Estate. *Pasch. 1712. between Bottomley and Lord Fairfax*, agreed clearly, and admitted *per Curiam in Cancellaria*, 1 *Chanc. Rep.* 254. S. P.

Of a Use not executed, a Woman shall not be endowed, neither shall the Husband be Tenant by the Courtesy. *Vide Perk.* 349. 1 *Co.* 123. 4 *Co. Vernon's Case, Doctor and Student*, lib. 2. cap. 22. *Dyer* 11. pl. 47. But as to the Husband's being Tenant by the Courtesy, *vid. Vern.* 585, 681. and *Q.* if there be any Difference.

But if a Father purchaseth Lands in his eldest Son's Name, and the Son is put into Possession, who afterwards falls Sick, and in his Sickness his Father gets him to execute a Deed, declaring his Name was made Use of only in Trust for him, and the Son recovers and continues Possession, and marries; after his Death his Wife shall be endowed, notwithstanding this Declaration of the Trust; and though the Father had got a Conveyance of the legal Estate from the younger Son; for *per Lord Chancellor*, this is a secret and fraudulent Deed

Deed of Trust, to deceive Creditors and Purchasers; and therefore reversed the Master of the Rolls's Decree, who had decreed it for the Father. *Pasch. 1701. between Bateman and Bateman, 2 Vern. 436.*

If a Man devises Lands to his Executors for Payment of Debts, and after Debts paid, to his Son in Tail; and the Son marries, and dies before Debts paid; the Estate of the Executors is only a Chattel Interest, and will not hinder the Son's Wife of Dower; but the Wife's Dower cannot commence in Possession, nor Damages be recovered for detaining it, but from the Time of the Debts being paid, *2 Vern. 404, per Curiam.*

If the Lands of J. S. are sequestred for a Personal Duty, and he marries, and dies, tho' the Lands were sequestred before Marriage, yet the Wife's Right of Dower will attach them; for this Sequestration shall not so far bind or cover them, as to hinder the Wife of her Dower, *1 Vern. 118. ruled on Demurrer, per Lord Keeper North.*

Instant.

If an Husband takes a Fine *sur Conusance de droit come ceo*, and renders arrear; although it was the Husband's, yet his Wife shall not have Dower, for it is in him and out of him *quasi uno statu* and by one and the same Act. *3 Leon. 11.*

Condition.

A Man sold his Land upon Condition, and after took a Wife, and died, the Heir entred for the Condition broken, yet the Wife shall not be endowed; and so if the Condition had been broken before the Death of the Husband, if he had not entred; for he had Title of Entry. *1 Brownl. 59.*

A Woman shall be dowable of an Estate Of an Estate granted by Tenant in Tail to her Husband and his Heirs, and descendible only for the Life of the Grantor. 1 Saund. 261. in Tooke and Glass's Case.

If a Man seised in Fee makes a Feoffment to divers Persons to her Use for Life, and to Uses which he shall declare by his Will, and after marries, his Wife shall not be endowed. *Per Curiam. Aliter*, if Uses exprest in his Will bearing Date *tali die ante* the Feoffment. *Ex Manuscript. Mri. Brownloe.*

One seized of Lands in Fee took a Wife, and levied a Fine of the said Lands with Proclamations, and afterwards was indicted and outlawed of High Treason, and died, and five Years passed after the Death of the Husband, and the Heir reversed the Attainder; the Question was in *Vivian Menvil's Case*, Whether the Wife shall be endowed? 13 Co. 19. And it was resolved that the Wife should be endowed; for though a fine levied, and Non-claim of five Years shall bar a Woman of Dower, and her five Years saved, yet in this Case the Wife is not to be aided by that Saving; for in Respect of the Attainder of her Husband she had not any Right of Dower at the Time of his Death, nor can she after his Death prosecute any Action for it. But the Wife is aided by another former Saving in the said Act, (*viz.*) *And saving to all other Persons, (viz.) who were not Parties to the Fine, such Action, Right, Title, Claim and Interest, in or to the said Lands, &c. as shall first remain, descend or come to them after the said Fine ingrossed and Proclamations made, &c.* so that they take their Actions and pursue their Rights according to Law within five Years next after such Action, Right, &c. to them accrued,

Of. and in this Case the Action and Right of Dower accrued to his Wife after the Reversal of the Attainder.

For or in what Respect of Disabilities a Woman shall be endowed or not

Where the Wife shall lose her Dower by the Attainder of her Husband, and where not.

The Wife of an Idiot, *non compos mentis*,

The Wife of one outlawed,

The Wife of one attainted of Felony or Treason, Hereby, *Præmunire*, shall be endowed.

So note at this Day, if the Husband be attainted of Felony, the Wife shall be endowed and yet the Issue shall not inherit the Land which the Father had in Fee-simple. *Iust. 40.* But before the Statute of 1 E. 6. the Wife should not have been endowed, and the Issue should have inherited.

But the Wife is not dowable if the Husband be attainted of Treason; for her Title begins by the Intermarriage, and ought to continue and be consummate by the Death of the Husband, which cannot be in this Case; for the Attainder of the Husband hath interrupted as in the Case of Elopement; and this Attainder is an universal Estoppel, and doth not run in Privy between the Wife and him to whom the Escheat belongs; but every Stranger may bar her of her Dower by Reason thereof, and a Pardon doth not help her: For now suppose the Husband obtaineth a Charter of Pardon and dies, this doth not help the Matter, for the same extends but to the Life of the Offender but doth not take away the Attainder, by which she is barred to demand Dower during the Attainder's being in Force; and so it is, though the Lands be aliened before the Treason committed, as it was in *Dyer 140 b.* Lady Gate's Case.

Wid. Stat. 5 & 6 Ed. 6. cap. 11. ult. Provis:
 in Leon 3 Maney's Case.

If a Man marry an Alien Woman she shall *Alien.*
 be endowed. 1 Roll. Abr. 675, that is to be
 understood as a Parliamentary Case by petition-
 ing, and the King's Answer. The Countess of
 Arundel's Case. For if a Man take an Alien
 to Wife, and after the Husband aliens the Land,
 and after she is made a Denizen, and then the
 Husband dies, she shall not be endowed, be-
 cause there was an absolute Disability; *aliter*,
 if she be naturalized by Act of Parliament.

If the King marry an Alien, she shall be en- *Alien Queen*
 dowed. 1 Inst. 31. b. *endowed.*

By the Stat. *Magna Charta*, cap. 7. The Wi- *Quarentine,*
 dow after the Death of her Husband shall give *what.*
 nothing for her Dower, but shall remain in
 the chief House of her Husband forty Days
 after his Death, within which Time Dower
 shall be assigned her: If she marries within the
 forty Days she loses her Quarentine. 1 Inst. 32. b.
 And if she departs from the House upon her
 Husband's Death, she cannot return again
 within the forty Days. *Hob. 153.* The Wife
 shall be allowed *Rationabilin Estoveria de bonis*
mariti, i. e. reasonable Sustenance during the
 forty Days.

Where Tenant in Dower dies intestate, be- *Tenant in*
 fore a Writ of Enquiry executed, the Admini- *Dower dies be-*
 strator cannot bring a *Scire facias* for the Da- *fore a Writ of*
 mages and mean Profits: But where Damages *Enquiry exe-*
 are ascertained upon the Writ of Enquiry, and *cuted; her ad-*
 Judgment thereupon, they are vested in the In- *ministrator*
 testate as a Debt, and the Administrator shall *cannot have a*
 have them; but the Demandant dying before *Scire facias.*
 the final Judgment, and when the Damages are
 due to her, only by Way of Satisfaction for an
 Injury, which is in the Nature of a Trespass,

and the Writ of Enquiry being in the Nature of a personal Action for them, it dies with the Person, and a *Scire facias* lies not for the Executors or Administrators. *Shower's Rep.* 97. *Salk.* 252.

Where the Heir may plead Detinue of Charters, and where not.

Where the Tenant pleads Detainer of Charters, he must plead, that from the Time of the Death of his Ancestor *paratus fuit, & adhuc paratus existit*, to assign her Dower if she would deliver the Charters. *Salk.* 252.

If the Wife be with Child, the Heir for the Time being cannot plead Detinue of Charters, for the Widow may keep them for the Infant.

41 E. 3. 11. b.

The Wife shall be endowed of the Capital Messuage.

The Wife may be endowed of the Capital Messuage, for there are no Feudal Baronies at this Day except *Arundel*——Feudal Baronies were those with which the King, at the Creation of them, gave Lands and Rents to hold of him for the Defence of the Realm; and of the Principal Messuage, called *Caput Baronie*, while such Tenures were in Being, the Wife could not be endowed. *Salk. Rep.* 253.

Tenant for Life, Remainder for Years, Remainder in Fee, his Wife shall be endowed.

Where there is Tenant for Life, Remainder to Trustees for ninety-nine Years, Remainder to Tenant for Life in Tail, and the Tenant for Life dies, his Wife shall be endowed, notwithstanding the intervening Estate, for that being for Years only is not to be regarded; but if the mesne Remainder had been for Life, it had been otherwise. *Salk.* 254.

Divorce.

As to Divorce, *vide supra*. If the Wife be divorced *causa præcontractus, consanguinitatis*, or Impotency, she shall not be endowed.

If the Wife elope, she is barred of her Dower. *Vide infra*.

What

What Act of the Wife shall bar her of her Dower.

If the Wife elope from her Husband, viz. if *Elopement.* the Wife goeth away and leave her Husband, and tarrieth with the Adulterer, she loseth her Dower, until her Husband willingly, without Coercion Ecclesiastical be reconciled to her, and permit her to cohabit with him.

Sponse virum mulier fugiens & adultera facta. Dote sua careat, nisi sponsi sponte retracta.

Though in this Case of Elopement the Wife could not be barred of her Dower by the Common Law, but by the Statute of *W. 2. cap. 34. Si uxor sponte reliquerit virum suum, &c.* If the Woman be taken away not *sponte*, but against her Will, and after consent and remain with the Adulterer without being reconciled, &c. she shall lose her Dower.

If the Wife go away with her Husband's Agreement with *A. B.* and after *A. B.* commits Adultery with her, and she remaineth with him without Reconciliation, she shall be barred of her Dower.

If she commit Adultery with him, though she doth not continually remain with him, it is Tarrying within this Statute. 2 *Inst.* 436.

If the Husband grant his Wife with her Goods to another, by Force of which the Wife lives with the Grantee afterwards all the Life of her Husband; she shall lose her Dower, because she lived in Adultery with him. 30 *E. 1. lib. Parliament. f. 96. William Paynel and Margery his Wife.* The Precedent is this:

Elopement pleaded in Dower, *vid. Dyer* 108
*n. 107. a. Parliament 30 E. 1. apud Westm. Peti-
 tio Will. Paynel & Margaretæ uxoris ejus, &c. quod Dominus Rex iis reddere vellet tertiam par-
 tem manerii quæ ipsam contingit de libero tenemento Johannis Commoys primi viri sui, &c. Et
 Nic' Warwick pro Rege plead Elopement de la
 femme de son baron oue le dit Will. Paynel & super
 hoc præfat. Willielmus Paynel & Margareta præ-
 tulerunt quoddam factum præd. Johannis Com-
 moys primi viri in hæc verba. Omnibus Christi-
 fidelibus, &c. Sciatis me tradidisse & commississe
 de spontanea voluntate mea Dom. Willielm. Pay-
 nel Milit. Margaret. de Commoys uxorem me-
 am, & etiam dedisse & concessisse & eidem Will-
 relaxasse & quiete clamasse omnia bona & ca-
 tallia quæ ipsa Margareta habet vel de cætero ha-
 bere possit, & etiam quicquid est de prædictis
 Margaret. bonis & catallis cum pertinentiis
 suis. Ita quod nec ego, nec aliquis alius no-
 mine meo in præd. Margaret. bonis & catalli-
 ipsius Margaretæ cum pertin. exigere vel vendi-
 cave poterimus nec debemus imperpetuum. Vol-
 & concedo & per præsens scriptum confirmo quod
 prædicta Margareta cum prædicto Domino Will-
 lielmo sit & remaneat pro voluntate ipsius Will-
 lielmi. In cujus rei testimonium & his testi-
 bus, &c. Et super hoc petit Judicium. Et
 consideratum est quod prædictus Willielmus &
 Margareta nihil capiant per petitionem suam, se-
 sint in misericordia. Cest petition fuit commenc-
 Westm. 1. 29 Ed. 1. Et Judicium 30 Ed. 1.*

If the Husband's Friends send him away from
 his Wife, so as the Wife knows not what is be-
 come of him, and they publish that he is dead
 and afterwards they procure the Woman to re-
 lease all Marriages and Interest in him as a
 Hu

Husband; and afterwards by the Persuasion of the Friends of the Husband marries with another, who dies, and she takes another Husband, the Wife having no Notice of the first Husband's being alive, although the Wife live in Adultery, and though the first Husband was not out of the Realm; yet inasmuch as she did not leave her Husband *sponte*, as the Statute saith, but by Persuasion of the Husband's Friends, that he was dead; and it did not appear that she knew he was alive, this is not any such Elopement as to bar her of her Dower.

1 Roll. Abr. 680. *Green and Harvey.*

The Wife had a Jointure made to her after *Fine* Marriage, and she and her Husband levy a *Fine sur Conscience de droit*, &c. and alien the Jointure; this shall not be good, after the Coverture, for her Dower of the Residue of the Lands of her Husband, because her Time of Election is not come until she become sole, according to the Statute of 27 H. 8. cap. 10. *Dyer 358. b.* 1 Inst. 36. b. 3 Co. 32. a.

The Husband being Tenant in Tail; the Remainder to his Wife for Life; the Husband makes a Feoffment to the Use of himself and his Wife for Lives for a Jointure, and dies without Issue; this Jointure was pleaded in Bar of Dower. *Per Curiam*: It is no Bar, because the Wife is remitted, and in her first Estate, and the Jointure avoided. *Moor 872. Wood and Shirley.*

If the Husband seised in Fee makes a Feoffment, reserving an 100 Marks Rent yearly for twenty Years next ensuing, to him and his Wife, and dies, and the Wife accept the Rent, yet this shall not be any Bar in a Writ of Dower, because she demands a Freehold; and that only of a third Part. *Tempore 1 Ed. 1. 65.*

If a Man seised in Tail for a valuable Consideration bargains and sells to another in Fee and covenants that he and his Wife will levy Fine for better Assurance; and it is agreed that 30 *l.* Part of the Consideration Money shall be paid unto the Baron, upon the Conusance of the Fine by the Baron and Feme; and after the Baron and Feme acknowledge a Fine before a Judge, in the Circuit, in the Vacation; and the said 30 *l.* is paid to the Feme, the Baron sick abed, and the Baron dies before the Term, and thereupon the Feme stops passing the Fine, and after brings a Writ of Dower, the Bargainee shall have no Remedy in Equity against the Dower, because it is against a Maxim in Law, that a Feme Covert should be bound without a Fine. *Mich. 5 Car. 1. between Hody and Lun, 1 Roll. Abr. 375. but Qu.*

For if a Feme Covert, by Agreement made with her Husband, is to surrender or levy a Fine, though the Husband die before it be done; the Court will, by Decree, compel the Woman to perform it. *Per Cur'. Between Baker and Child, 2 Vern. 61.*

Of the Wife's being barred by Fine and Non-claim, *vide Tit. Fine, and 13 Co. 20.*

Divorce.

If Divorce be *causa Consanguinitatis, Præcontractus, Affinitatis, Frigiditatis*, the Wife shall not have Dower.

As concerning Dower at the Common Law, there must be Assignment either by the Sheriff, by the King's Writ, or by the Heir, or other Tenant of the Land, by Consent and Agreement between them.

Of Satisfaction or Bar of Dower.

If a Man devises certain Lands, Money, Goods, &c. in Lieu and Satisfaction of Dower, the Wife cannot have both, but she may waive the Devise, and claim her Dower. 2 Chan. Ca. 24. 1 Chan. Ca. 181. 1 Vent. 340. S. P.

But if a Man devises Lands to his Wife, during her Widowhood, without expressing any Consideration, the Wife shall have both: *First*, Because a Will imports a Consideration in itself, and cannot be averred to be in Bar of Dower, without it be so expressed. *Secondly*, Dower cannot be of less Estate than for Life of the Wife. *Thirdly*, A Right to Dower cannot be barred by collateral Recompence. 4 Co. 1, 2. Vernon's Case. Co. Litt. 36. Moor, pl. 103. But if she makes her Election to take under the Will, she cannot afterwards claim her Dower. 1 Cr. Eliz. 128. 3 Leon. 272. 3 Co. 27. Dyer 220.

J. S. devised Legacies to his Wife out of his Personal Estate, and devised to her Part of his Real Estate, during her Widowhood, and devised the Residue of his Estate to Trustees for twenty-one Years, for Payment of Debts and Legacies; and the Remainder of the whole Estate he devised to the Plaintiff (who was his Godson, and of his Name, but a remote Relation) for Life, and to his first and other Sons in Tail; and my Lord Chancellor Somers decreed, that though it was not declared in the Will to be in Lieu and Satisfaction of Dower, yet as it may be plainly collected to be so intended, (he having made Disposition of his whole Estate,) and as a collateral Satisfaction, may be a good Bar to Dower in Equity, tho' not

not at Law; that she must either take her Dower, and wave the Devise, or accept the Devise, and wave the Dower. *Mich. 1699* between *Lawrence* and *Lawrence*, 2 *Vern.* 36. But this Decree was reversed by *Wright*, Lord Keeper, *Mich. 1702*; which Decree of Reversal was affirmed in the House of Lords, with 30 *l.* Costs, 17 May 1717.

The Lady *Radnor's* Husband was seised in Tail of the Lands in Question; but there was a Term for ninety-nine Years, prior to his Estate, (which was created for Performance of several Trusts in the Earl of *Warwick's* Will, which were all performed, and after to attend the Inheritance), he levied a Fine, and suffered a Recovery, and sold the Estate to *J. A.* who had Notice of the Marriage; but his Wife not joining, she, after his Death, recovered her Dower, with a *Cessat Executio*, during the Term, and brought her Bill to have this Term removed, and to have the Benefit of her Judgment and Recovery at Law; but the Court held, that this being against a Purchaser, Equity ought not to give her any Relief, and therefore dismissed the Bill. Between the Lady *Radnor* and *Vandehendy*, 1 *Vern.* 356. 2 *Chanc. Ca.* 172. S. C. which Decree of Dismissal was affirmed in the House of Lords. *Show. P.* 69, 70.

A Term was raised in *Black-Acre*, in Trust to indemnify *A.* against Incumbrances that might affect *White-Acre*, which he had purchased of *B.* the Defendant; and the Widow of the Son and Heir of *B.* brought a Writ of Dower of *Black-Acre* against the Plaintiff, who was an Infant; and his Guardian had let her take Judgment at Law without setting up the Term, or taking any Notice of it; and the Infant brought

brought his Bill to be relieved against the Judgment; and the Court held, that this Case was the same with Lady Radnor's Case; the Term being created to indemnify a Purchaser must be so; and subject to that must be in trust for the Heir; and there is no Difference, where the Widow is Plaintiff, or Defendant; or it is the want of Equity excludes her from Relief. *Hill. 1700. between Wray and Williams, Vern. 378. S. C. but no Resolution.*

But where a Widow brought her Bill to be relieved against a Term for Years, assigned in trust to attend the Inheritance, and which had been set up by the Heir at Law only in bar of her Title; and the Master of the Rolls decreed for the Widow, and that the Term should not stand in her Way; though it was objected, that it was the same with a Purchaser, who had Notice. *Mich. 1705. between Dudley and Dudley, S. P. Decreed Pasch. 1710. between Higford and Higford.*

That Tenant by Courtesy shall have the Aid of Equity in removing a Trust. *Vid. 2 Vern. 536, 585, 681.*

A Dowress may redeem a Mortgage, paying her Proportion of the Mortgage Money; and to the Rest, she may hold over till she is satisfied. *Decreed Hill. 1700. between Palmer and Danby.*

If the Wife joins in a Mortgage, and levies a fine, with an Intent to bar her Dower; and in Consideration thereof the Husband agrees, that she shall have the Equity of Redemption in Lieu of her Dower; and he afterwards mortgages the same Estate twice more, though this Agreement be fraudulent against the subsequent Mortgages, so as to intitle the Wife to the whole Equity of Redemption, yet she shall have her

her Dower, if she survives her Husband; and shall not be put to her Writ of Dower, because the Estate may be so convey'd away by force of the Mortgagees, that possibly she may not know against whom to bring her Writ of Dower. *Hill. 1684. between Dolin and Colman, Vern. 294.*

J. S. apprehensive of a Charge of High Treason, makes a Conveyance of his Lands to his Son, and afterwards marries a second Wife. A Court of Equity will order that such Conveyance be not made use of to hinder such second Wife of her Dower. *3 Chan. Rep. 94.*

If there be a fraudulent and partial Assignment of Dower by the Sheriff, Equity will relieve against it. *Hill. 1683. between Hoby and Hoby, 1 Vern. 218, 219. 2 Chan. Ca. 160. S. C.*

Assignment of Dower.

What Persons may assign Dower, or not.

An Infant may assign Dower in *Pais*, because he is compellable thereto by Writ.

Guardian in Socage may not assign Dower.

Joint-tenant. If two or more be Joint-tenants of Lands, the one of them may assign Dower to the Wife or a third Part in Certainty; and this shall bind his Companion, because they were compellable to do the same by Law; but if one assign a Rent it shall not bind his Companion.

By Disseisor. Assignment may be made by a Disseisor Abator, Intruder, and be good, if there be no Covin, and if it be not prejudicial to the Disfeisee.

Regula. It is a general Rule, No Assignment can be made but by such as have a Freehold, or against whom a Writ of Dower doth lie; and therefore

Assign-

Assignment by a Guardian in Socage is void;
and so by Tenant by Elegit, Statute, or Tenant
for Years. 1 Inst. 34, 35.

There needs no Livery of Seisin or Writing No Livery and
any Assignment of Dower, because it is due Seisin.

Common Right :

If the Husband make several Feoffments of Dower assign-
several Parcels, and dies, and the one Feoffee ed by one Feoff-
gives Dower to the Wife of Parcel of the ment.

and, in Satisfaction of all the Dower, which
ought to have in the Lands of the other
feoffees; the other Feoffees shall take no Bene-
fit of this Assignment, because they are Stran-
gers thereto, and cannot plead the same; but
in that Case, if the Husband die seised of other
Lands in Fee-simple, which descend to his Heir,
and the Heir endoweth the Wife thereof; this
is good, and the second Feoffees shall take Ad-
vantage of it, and vouch the Heir; so as there
is in this Case a Privy between the Heir and
the Feoffees. 1 Inst. 35. a.

What Assignment of Dower is against common
Right, or not.

An assign Dower of an Advowson, is against
Common Right; for she ought to have the third
part of common Right.

Assignment of Rent out of Lands is against
Common Right. 12 Ed. 4. 2.

Assignment of all the Wood, or all the Mea-
dow in Lieu of all the Wood, Meadow, Pasture,
and Land, is not against common Right. Com-
mon Right is a third Part of each.

If she be dowable of three Manors, and she
gives of the Heir, one Manor in Dower, in
advantage of all, this is an Endowment against
Common Right. 18 H. 6. 27.

What

*What Things may be assigned in Lieu of Dower.***Rent.**

A Rent of the same Land may be assigned in Lieu of a Dower.

Rent on Condition.

If a Man assign such Rent on Condition, she is not good; for she ought to have it free without Condition, as she should the Land. 27 *Elizabeth* *Wentworth's Case*.

Twenty Acres of Corn out of the same Land.

In Dower, the Tenant pleads that he has assigned to the Wife, in the Name of Recompence of her Dower, twenty Acres of Corn out of the same Land; and held a good Bar, as well as a Rent, or other Profit out of the Land; aliter, if an Horse or Sheep, for this is not of the Nature of Soil. *Moor* 59.

Regula.**Assignment of other Lands.**

It is a Rule, Assignment of other Lands whereof she is not dowerable, or of a Rent issuing out of it, is no Bar of Dower.

Assignment with a Condition or Exception.

If Dower be assigned on Condition, the Condition is void; so if Dower be assigned of the Land, excepting the Trees growing upon the Land; this is a void Exception, for she comes in by her Husband. 44 *Elizabeth*. *B. R. Bullock and Finch*. *Plowd. Com. Colthirst and Bejusben*.

Dower assigned with Remainder over.

If Dower be assigned with a Remainder over this is a void Remainder, because she comes in by her Husband; and if it should be a good Remainder, it would be without a particular Estate. *Pl. Com. Colthirst*.

Endowment by Metes and Bounds.

Albeit of many Inheritances that be intire whereof no Division can be made by Metes and Bounds, a Woman cannot be endowed of the Thing itself; yet she shall be endow'd thereof in a special Manner. *Vide supra*.

Note

Note; Endowment by Metes and Bounds, according to common Right, is more beneficial to the Wife, than to be endow'd against common Right; for there she shall hold the Land charged in respect of a Charge made after her Title of Dower. *1 Inst. 32. b.* As if a Man be seised of three Manors of equal Value in Fee, and taketh Wife, and chargeth one of the Manors with a Rent-charge, and dieth, she may, by the Provision of the Law, take a third Part of all the Manors, and hold them discharged; but if she will accept the intire Manor charged, she shall hold it charged. *1 Inst. 171. a.*

Endowment by Metes and Bounds more beneficial for the Wife.

Note; The Husband must be sole seised; where he is seised in common, she cannot be endow'd by Metes and Bounds; as if there be two Joint-tenants in Fee, and the one alieneth that which to him belongeth to another in Fee, who taketh Wife and dies; the Wife for her Dower shall have the third Part of the Moiety, which her husband purchased, to hold in common with the Heir of her Husband and the other Joint-tenant; for here she cannot have Dower assigned by Metes and Bounds; *aliter*, of Joint-tenants: For the Joint-tenant, which surviveth, claimeth the Land by the Feoffment and Survivorship, which is above the Title of Dower; and he may plead the Feoffment made to himself, without naming his Companion which died; but Tenants in common have several Freeholds and Inheritances, and their Moieties shall descend to their several Heirs, and therefore their Wives shall be endow'd.

Not to be endow'd by Metes and Bounds where the Husband is seised in common.

Assign

Assignment of Dower, how to be made.

Generally by the Sheriff; sometimes by the Heir by Consent; sometimes in Chancery.

*By the Sheriff.***Regula.**

Demandant cannot enter or distrain till Execution sued.

It is laid down for a Rule: Where-ever the Writ demands Land, Rent, or other Thing in certain, the Demandant, after Judgment, may enter or distrain before any Seisin delivered to him by the Sheriff upon a Writ of *Habere fac Seisinam*; but in Dower, where the Writ demands nothing in certain, there the Demandant, after Judgment, cannot enter nor distrain until Execution sued; by which Execution the Sheriff is to deliver the third Part in Certainty to the Demandant. *1 Inst. 346.* If a Woman bring a Writ of Dower of three Shillings Rent, although she ought to be endow'd of one Shilling, yet she cannot, after Judgment, determine *12 d.* before Assignment, because the Demand was uncertain.

The Sheriff's Return in Dower.

In Assignment of Dower, the Sheriff's Return need not be of such precise Certainty, for it is but the Return of the Sheriff; therefore *Quod habere fecit Seisinam de uno Tenemento sive firma, &c.* and when he saith in the End, that he deliver'd them all by Metes and Bounds, it is sufficient. *Cro. Jac. 612.* Sir Charles Howard's Case.

Barred to demand more than what she accepted upon the Sheriff's Assignment.
Assignment of Dower amended.

If the Wife accept and enter upon the Sheriff's Assignment lesser Land in Quantity than the Third of the Whole, upon Record, she is barred to demand more. *Moor 679.* in Longvil's Case. The Court order'd Amendment of Assignment of Dower, being under Value; and on Refusal of an equal Division proffered to him by the

Dowager,

Dowager, committed the Sheriff for taking 60 Pounds of the Lady to execute his Writ of Execution, and Information against him. 1

Keb. 743.

In Dower, the Demandant recover'd Dower of the Tenths of Wool and Lamb; how Execution shall be made is the Question: And the Justices conceived that the Sheriff might deliver the Tenths of every third Yard-Land, and assign the Yard-Lands in certain, or deliver the third Part of all in general; and this Dower the Sheriff may assign without a Jury. 2 *Brownl. 148.*

How Execution to be made of the Tenths of Wool and Lamb.

If a Woman recover Dower of a Rectory impropriate, where there is not any Glebe, the Sheriff shall put her in Possession of the third Part of the Tithes generally, and not of the Tithes of the Land of the Parish in certain: *Mich. 9 Jac. in B. R. per Curiam.*

How to be endowed of a Rectory impropriate, where there is no Glebe.

If a Woman be dowable of a Manor, the Sheriff may assign the third Part of the Manor in common, in Lieu of Dower, without setting it out by Metes and Bounds.

Endowment of a Manor how to be.

By the Heir.

An Entry being taken away by Descent, is revived by his Endowment; as a Disseisor dies seised, and the Heir enters, &c. who endows the Wife of the Disseisor of a third Part; now presently after the Wife entreteth, and hath the Possession of the same third Part, the Disseisee may lawfully enter upon the Possession of the Wife into the same third Part; because, when the Wife is endow'd, she shall not be in by the Heir, but immediately by her Husband being the Disseisor, who is in for her Life by a Title paramount the Dying seised and Descent; and

Entry taken away by Descent, revived by Endowment.

the Law adjudgeth no mean Seisin between the Husband and the Wife. *Litt. Sect. 393.*

Acceptance
waves the En-
dowment by
Metes and
Bounds.

If *A.* seised of Land in Fee takes Wife, and after deviseth it for one and twenty Years to *B.* and dies, and after *C.* his Heir, assigns to the Widow the third Part of the Land for her Dower, without setting it out by Metes and Bounds, and the Wife accepts it in Satisfaction of her Dower, although she was not bound to accept this so in common, without setting it out by Metes and Bounds, for the Prejudice that might accrue to them to occupy it in common; yet inasmuch as the third Part in common is due by the Law, and they both consent to accept this according to the Law, they may by their Consents wave the Assignment by Metes and Bounds, which is only for their own Advantage; and albeit the Lessee for Years does not agree to it, yet the Assignment of the Tenant of the Freehold shall bind him. *Trin. 1651. Cootes and Lambert.*

In Chancery.

Dower may be assigned out of Chancery by a Writ *de dote assignanda*; and if it be evicted, the Record shall be transmitted into Chancery, and there she shall be endowed *de novo*. *Cro. Eliz. 364.*

Damages.

Not to be re-
lieved in
Equity.

If a Feme, Tenant in Dower, sue in a Court of Equity for Damages, where her Husband died not seised, a Court of Equity, ought not to relieve her, for it is against the Law.

If the Baron make a Feoffment to the Use of himself for Life, the Remainder to the Son in Tail. *Per Curiam*; This is not such a Dying seised

seised by the Husband, for the Wife to have Damages in Dower. Dame Egerton's Case. But the Husband ought to be seised of an Estate-tail, or Fee-simple, which may descend to the Heir. *Litt. Rep.* 341.

Alienation, or Death of the Heir after Recovery, before Seisin, prevents not Damages. *1 Keb.* 85, 646, 711.

If Tenant in Dower be disseised, and the Disseisor makes a Feoffment, the Tenant in Dower shall recover all her Damages against the Feoffee, for she is not *deins le Statute of Gloucester, cap. 1.* by which every one shall answer for their Time. *2 Brownl.* 41. *Tenant in Dower not within the Statute of Gloc.*

What Charges made by the Husband, the Wife endowed shall avoid, or not.

Lord of a Copyhold Manor, in which were many Copyholders for Life, takes Wife; the Copyholder dies, the Lord grants this to another, and dies; adjudged that the Wife shall not avoid this Grant in a Writ of Dower, for that the Custom is before the Title of Dower. *2 Co.* 4. *Dyer* 8 *Eliz.* 21. *contra.* *Copyhold.*

If the Wife accept Dower of the Heir against common Right, she shall hold this subject to the Charges of her Husband. *8 H. 6. cap. 27.* Otherwise, if she be endow'd against common Right by the Sheriff. *Dower against common Right.*

If A. seised in Tail of a Manor, to which an Advowson is appendant, grants the next Presentation to B. and after marries C. and dies, and the Wife is endow'd of a Manor, with the Appurtenances, in Lieu of all her Dower, and after the Church is void. *Quare*, If she may present and avoid the Grant made before Coverture?

Writ and Declaration.

Writ of Right Dower.

Writ of Dower *unde nihil habet*.

Tenant for Life, Reversion in Fee, of Lands whereof the Demandant had Title of Dower, and she brought a Writ of Dower against the Tenant for Life; hanging the Writ, he in Reversion levied a Fine, with Proclamations, of the Reversion; the Tenant for Life dies, five Years expire, and the Demandant brought a new Writ against the Tenant in Possession. *Hob. 165. Quære.*

In *Fulliam* and *Harris's* Case: The Writ was, *Præcipe A. quod reddat E. Fulliam rationabilem dotem suam de terris, &c. dudum B. Fulliam quondam viri sui: Per Curiam*, The Writ is ill; and it ought to be *Præcipe A. quod reddat E. Fulliam quæ fuit uxor B. Fulliam, &c.* For in the Beginning of the Writ she ought to be named *Uxor* of her Husband, for that is the Name whereby she claims her Dower. *Cro. Jac. 217.*

In Dower the Demand was *de tertia parte decem messuagiorum, &c. in tres partes dividend'*: The Judgment was to recover *Seisinam de tertia parte tenementorum prædictorum cum pertin' tenend' ei in separabilitate per metas & bundas*. It was ill, because they are Tenants in common, and the Judgment ought to have been *Tenendum insimul & in communi*; but had it been divided, *aliter*. *Ex Manuscript. M^ri Brownloe.*

Plead;

Pleading.

If in a Writ of Dower the Tenant would bar the Demandant, by a Jointure made during the Coverture, he ought to say, *Quod intrando creavit*; for if the Wife entreth and agreeth, the same is a good Bar of Dower. 3 Leon. 272.

In Dower, the Tenant pleads the Release of the Demandant made to such a Tenant in Possession *tenementorum prædictorum*; and because he doth not say he was *tenens liberi tenementi*, it was held to be no Plea. Cro. Jac. 151.

If one plead an Acquittance or Release in Bar of Dower, he ought to shew that this was for the same Cause of Action. 5 H. 7. 1.

A Release of all his Right, &c. to him in Reversion, shall bar the Wife of Dower. 8 Co. Alkham's Case.

N'unique accouple in loyal Matrimony pleaded in London, and Replication to it, and the Record removed into the Common Bench, and Writ to the Bishop. Co. Entr. 180.

In a Writ of Dower sued in any Court of Wales, if they are at Issue upon *n'unique accouple*, &c. the Court there hath not Power to take Process to the Bishop; but the King shall write to the Marshal there, to amesne the Record here *in Banco*; and here Process shall be awarded to the Bishop. 19 H. 6. 12.

In Dower against two: If one acknowledge the Action, and the other plead *n'unique accouple*, &c. the Demandant shall not have Judgment against him who acknowledged, until Issue tried; for this goes to the Whole. 7 H. 6.

So if one acknowledge the Action; and the other plead Assignment of Rent out of the Land, &c. in Lieu of Dower, this ought to be

tried before Judgment against the others for the Moiety, for this goes to the Whole.

Non-tenure.

Non-tenure to Part or All is a good Plea.

Assignment of Rent out of the Land pleaded

In Dower the Defendant pleads Assignment of Rent out of the Land; but because he do not say, he was a Tenant at the Time of the Rent assigned, it was adjudg'd against him *Dyer* 361. And so is *Beaumont and Dean's Case* 2 Leon. p. 10. The Defendant pleaded in Plea that he himself, before the Writ brought, assigned a Rent of 10 l. per Annum to the Demandant, in Recompence of her Dower. The Demandant demurs, and for Cause shews, because the Tenant had not shew'd what Estate he had in the Land at the Time of granting the Rent, as to say, that he was seised in Fee, and granted the said Rent, that it might appear to the Court upon the Plea, that the Tenant had Power to grant such a Rent; and the Demurrer was held good.

The Demandant, after the Death of her Husband, enters into the Land in Demand, and continues the Possession of it five Years; and afterwards the Heir enter'd, upon which she brought Dower: It was agreed, that the Tenant need not to plead *touts temps prist* after his Re-entry for the Time the Demandant had occupied the same, is a sufficient Recompence for the Damages. 3 Leon. 50. *Riches's Case*.

Touts temps prist.

By the Heir.

If a Woman bring a Writ of Dower against the Heir, and the Heir comes into Court upon the Summons the first Day, and pleads that he hath been always ready, and yet is to render Dower, &c. if the Wife have not requested Dower, she shall lose the mean Values, and her Damages; but if she have requested her Dower she may plead it, and Issue thereupon may be taken, and a Request in *Pais* is sufficient: And

The Reason why *touts temps prist* is a good Plea by the Heir in this Case, is to bar her of her Damages, because the Heir holds by Title, and does no Wrong till Demand be made. 1 *Inst.* 2. b. 33. a.

Dower was brought against J. S. J. S. pleads, and Judgment given for the Defendant; and afterwards the Judgment was reversed, and she sought a new Writ of Dower; and the Tenant pleaded he always was ready, and yet is: Against which the Demandant pleaded the first Record to stop the Tenant; the Tenant pleads *Nul Nul tiel Record*. *Per Curiam*; The Demandant cannot conclude the Tenant, by that Replication, to plead *Nul tiel Record*, for the Judgment reversed, and so no Record, and it cannot be certified as a Record; but if Issue had been taken upon the Plea of the Tenant, *absque hoc*, that he was ready, the same might have been given in Evidence against the Tenant. 3 *Leon.* Riches's Case.

In Dower; If the Tenant shew, before the Husband had any Thing in the Land, A. was seised of the same Land in Fee, and let it for years, rendering Rent, and granted the Reversion to the Husband of the Plaintiff, who died seised of the Reversion, and demanded Judgment, If the Demandant shall have Dower, &c. this is a Plea in Bar of Dower, but proves she had Title of Dower; but this saves the Lease for years, and she shall have Judgment only of the Reversion of the Rent. *Winch p. 80.*

If Tenant in Fee-tail general makes a Feoffment in Fee, and takes back an Estate in Fee-simple, and after had taken Wife and had Issue by her, yet she shall not be endow'd; for that the Fee-simple is vanish'd by the Remitter, and her Issue hath the Land by Force of the Entail;

but in this Case, the Tenant can never plead that the Husband was never seised of such an Estate, whereof the Demandant might be endow'd, but he must plead the special Matter.

1 Inst. 31. b.

*N'unique
seised.*

The Issue was, *N'unique seise que Dower*; and *per Curiam*, The Tenant shall never give in Evidence a Remitter to defeat the Estate of the Husband upon this Issue, but ought to plead it and shew the Remitter in certain, and that the Issue was of another Estate than the Husband had, and then the Wife shall be barred; and it is the same Law to say the Husband's Estate is defeated by Condition. *Dyer 41. a.*

Sir J. S. and Dorothy his Wife, late Wife to Sir H. Bowyer, brought Dower against Barbara Wood Widow: The Tenant pleaded, that Sir H. Bowyer was seised in Fee of the Manor of W. and made a Feoffment thereof to the Use of himself and Dorothy his Wife, for the Term of their Lives for her Jointure, the Remainder to one Bowyer, and then died, and his Wife enter'd and claim'd it for her Jointure. *Et hoc paratus, &c.* The Plaintiff replies, That before the said Feoffment made, the said Sir H. Bowyer being seised of the said Manor, did covenant to stand seised thereof to the Use of himself in Tail; and for Default of such Issue, to the Use of his Wife for Life; and after to Sir Thomas Henly in Tail; and afterwards made the Feoffment prout, and died *sans Issue*; and that she enter'd, claiming by the Indenture of Covenant, and was remitted. The Tenant rejoins, That the said Feme enter'd after the Death of her Husband, claiming her Estate for Life as Jointure by the said Feoffment, and demanded Judgment, If she shall, against her Claim, be remitted? And to this the Plaintiff demurs.

Remitter.

demurs. It was adjudg'd, that she was *volens* remitted for the Benefit of him in Remainder. But *per Curiam*, The Tenant's Plea is ill; for the Tenant ought to have taken a Traverse to the Matter alledg'd in the Replication, and so ill in Substance, as it is in *Cro. Jac.* 488. But by *Hobart*, a Plea of Claim, by Force of the Jointure, was pleaded out of Time and idle, and requires no Traverse. *Vide Hob. p. 71.*

Plea pleaded out of Time.

Sir John Sherly and Barbara Wood.

Fine with Proclamations, and that she did not claim within five Years after the Death of the Husband. *Cq. Entr. 171. Vide supra, Tit. Fine.*

Fine and Non-claim.

By Attainder of Treason, or Petty Treason, the Wife shall lose her Dower, and it may be pleaded. *5 Ed. 6. cap. 11.* Not so of Murder or Felony.

Attainder of Treason.

Elopement by the Demandant is a good Plea in Bar. *Vide supra.*

Elopement.

In Dower to say, that the Husband had not an Estate for Life, is no Plea, for this is but the general Issue. *10 H. 6. 17.*

General Issue.

If a Divorce be *a vinculo matrimonii*, this is a good Bar.

Divorce.

It is a good Plea, that the Wife was not nine Years old at the Time of the Death of the Husband.

That the Wife was not nine Years old at his Death.

That the Wife is an Alien is a good Plea.

Alien.

If an Estate be made to the Wife before Coverture, (or after, if after the Death of her Husband she enter and agree to it) for Term of her own Life, or a greater Estate; this is a Bar, if it be express'd to be for a Jointure, or it may be averred. *4 Co. 1. Vernon's Case. 1 Inst. 36. Co. Entr. 171.*

Jointure.

In a *Scire fa'* to execute a Recovery in Dower, it is no Plea to say, that the Demandant accepted a Rent,

Acceptance of Tenant.

a Rent, after Judgment, out of other Land; but the Heir, &c. may assign to the Wife Parcel of the Land, or a Rent by Parcel out of the same Land, in full Satisfaction of her Dower; and if **Heir ousted.** she bring a Writ of Dower against the other, he may vouch the Heir who shall plead this.

Detainment of Charters pleaded.

Detainment of Charters concerning the same Lands whereof she claims Dower, is a good Plea in Delay of her Dower. 11 H. 4. 3. b.

If Detainment of Charters be pleaded in Delay of Dower, he who pleads this ought to allege what Charters they are, as certainly as in a Count, or Detinue of them. 14 H. 6. 4.

In Dower, against the Feoffee of the Husband, Detinue of Charters is no Plea, but for the Heir. *Hob.* 113.

Demand of Lands in *A.* and *B.* against the Heir. The Tenant pleads *N'unique seisie que Dower.* The Jury found the Husband was seised during the Coverture *de omnibus tenementis infra script. præterquam* the Tenements in, &c. *sicut præd. M. dotari poterit. Per Curiam:* The *Præterquam* is idle, and Surplusage, and the Seisin of Land in *A.* and *B.* is confessed, and the Jury have assessed Damage; and therefore dying seised is not found by the Verdict; but the Demandant may pray Judgment of the Land and release Damages; or the Demandant may aver, that the Husband died seised, and have Writ to enquire of the Damages 1 *Leon.* 37. *Butler* and *Aires.*

Release Damages.

Return of the Sheriff upon a Recovery by Default.

In a Writ of Dower, if the Plaintiff recover by Default, and upon this a Writ is awarded to the Sheriff or Bailiff where the Recovery is, to deliver to the Plaintiff *tertiam partem per metas,* and

and to enquire of the Value by the Year, and how much Time is passed after the first Demand of the Dower, and what Damages she has suffered. And upon this the Sheriff returns, That he had delivered the third Part of the Lands, and that two Years are past after the first Demand, and Damages 50 *l.* and accordingly Judgment is given to hold in Severalty, and to recover Damages. Though the Judgment is not good as to the Damages, inasmuch as it is not averred that the Husband of the Plaintiff died seised, nor is it so found by the Jury; so as the Judgment is erroneous, yet it shall be reversed only as to this. *1 Roll. Abr. 776. Tye and Atkins.*

The Tenant in Dower vouched the Son to Warranty, as Son and Heir to the Husband of the Demandant, who appeared and enter'd into the Warranty *gratis*, and he pleaded he had nothing by Descent from the Father: Upon which Plea the Tenant and Vouchee were at Issue, and the Demandant had Judgment against the Tenant to recover, but *cesset Executio*, till the Voucher is determined: After that, before the Day of *Nisi Prius*, the Voucher died, and at the Day the Tenant lost by Default, and the Demandant prays to have a Writ of Seisin. *Winch p. 88, 89.*

In a Writ of Dower brought by a Woman of *Gavel-kind* a third Part. The Tenant pleaded, that the Lands of which Dower is demanded are in Nature of Gavel-kind; and that the Custom of such Land is, that Dower ought to be demanded of a Moiety. The Demandant demurs; and by the Justices: She may demand Dower of a third Part, or by Custom; but *Quare*, for it has been adjudged contrary. *1 Leon. 62.* The Custom is, that the Wife ought to be endow'd of the Moiety of such Land *quoadiu non maritata remanserit*,
G

E non aliter. Judgment against the Deman-
dant. 1 Leon. 133. Hunt and Gilborn.

Trial. Evidence. Issue.

*That the Hus-
band is alive,
how to be tried.*

If the Tenant plead that the Husband is a-
live, this shall be tried by the Justices, by Proofs
before them for greater Expedition. *Vid. Pre-*
cedent, Rast. Entr. 228. 2 Inst. 80. 8 H. 6. 23.

*Where the
Judgment
shall be taken
upon the Con-
fession, and
not upon the
Verdict.*

In Dower ; if the Defendant by his Plea ac-
knowledgeth that the Baron was seised *Que*
Dower, &c. and Issue is taken upon an imma-
terial Thing, and this is found *pro Quer.* and
Judgment accordingly ; yet in a Writ of Error
the Court shall take the Judgment to be upon
the Confession, and not upon the Verdict. 21
Ed, 4. 46. Per Cur.

*Triable by
Witnesses.*

M. O. and her second Husband brought an
Action of Dower against *T.* and demanded
Dower of the Endowment of one *P.* her first
Husband: It was agreed that this Trial ought
to be by Witnesses, according to *Dyer 155.*
And it was awarded by the Court, that the
Counsel of either Side should draw up Interro-
gatories, and put their Names to them, and
then they should be delivered, and he shall
have the Examination of the Witnesses on both
Sides, and then seal up the Interrogatories a-
gain, and so remain until they were delivered
over to the Court, and then *qui melius pro-*
bat, melius habet. Winch 82. Mary Over versus
Tucker.

*Verdict uncer-
tain.*

In a Writ of Dower of one Messuage, and
one Garden ; If the Defendant plead *N' unque*
seisie que Dower, and the Jury find that the Hus-
band of the Demandant was seised of the said
Messuage and Garden, all but so much as *J. S.*
had, &c. This is not a good Verdict, because

non constat how much of the Land J. S. had; and so meerly uncertain of what Judgment should be given. 2 *Rol. Abr.* 694. *Pope and King.*

Damages. Judgment.

It is a needful Thing for the Wife after the Death of the Husband, as soon as she can, to demand her Dower before good Testimony, otherwise she may lose her Damages. 1 *Inst.* 32. b. And a Request in *Pais* is sufficient. *Request in Pais to assign Dower.*

By the Statute of *Merton*, the Wife shall recover Damages in her Writ of Dower, from the Time of the Death of her Husband; it must be in a Writ of Dower *unde nihil habet*, and not in a Writ of Right of Dower; for in no Writ of Right Damages are to be recovered; and she shall recover Damages only where the Husband died seised of the Freehold and Inheritance. *In what Writ of Dower Damages shall be recovered, and from what Time.*

It is to be observed that the mean Values and Damages are to be recovered against the Tenant in a Writ of Dower; and the Lord Coke citeth *Belfield* and *Rouse's Case*. The Tenant as to Parcel, pleads Non-tenure, and for the Residue Detainment of Charters, upon which Pleas they were at Issue, and both Issues by the Jury found against the Tenant, and found further that the Husband died seised such a Day and Year, and had a Son, and that the Demandant and the Son, by six Years after the Decease of the Husband, took the Profits of the Land, and that after the Son died without Issue; after whose Decease the Land descended to the Tenant, as Uncle and Heir to him; by Force whereof he entred and took the Profits, until the purchasing of the original Writ, and found

found the Value of the Land by the Year, and assessed Damages and Costs; and the Demandant had Judgment to recover Damages for all the Time from the Death of her Husband, without any Defalcation. Let the Tenant take Heed therefore how he pleads false Pleas.

False Pleas.

The Statute of *Merton* extends to Copyholds where Women are dowable.

No Damages on Dower assigned in Chancery.

If the Wife have Dower assigned to her in Chancery, she shall have no Damages, for the Words of the Statute be, *Et Viduæ per Placitum recuperaverint.*

Judgment on Nil dicit, and Enquiry, and Damages assessed.

W. brought a Writ of Dower against *N.* and Judgment was given upon *Nihil dicit*; and because the Baron died seised, a Writ of Enquiry of Damages was awarded, by which it was found, that the third Part of the Land, which she ought to have in Dower, was of the Value of 8 *l. per Annum*, and that eight Years *elapserunt a morte viri sui proxime ante inquisitionem, & assident damna ad 80 l.* And the Demandant had Execution after Judgment upon the *Habere fac. seisinam.* Error assigned: 1. Because Damages are assessed to the Time of the Inquisition, where they ought to be but to the Time of Judgment; *Sed non allocatur.* 2. Because Damages are assessed for the whole eight Years after the Death of the Husband, where it appeareth that for Part of the said Years the Demandants were seised of the Lands by Force of the Judgment and Execution in the Writ of Dower; and upon this the Writ of Error was allowed. 1 *Leon. 56. Walker and Nevil.* And it was assigned for Error in this Case, that they assessed Damages beyond the Revenue: *Sed non allocatur.* For perhaps the Demandants have sustained more Damage than the bare Revenue.

If a Feme recover in a Writ of Dower before the Writ of Enquiry of Damages awarded, and before the third Part assigned by Metes and Bounds; the Judgment is perfect as to the Reality, and the Damages are given by the Statute by Way of Addition. 17 Car. 1. B. R. Steward and Steward. *Judgment when perfect.*

If a Woman recover Land in a Writ of Dower, and after the Sheriff return Damages from the Writ purchased *usque diem Judicii*, and after the Tenant brought a Writ of Error in *Executione Judicii*; He may upon this assign Error in the Judgment given for the Damages upon the Return of the Sheriff: For the last Judgment is not an Execution, but an Inquest of Office by the Statute of Merton. And it is the Use always to bring but one Writ in such Case; and there is not a Writ *Quia Judicia reddita*, but *Judicium*. Trin. 11 Car. 1. B. R. *Poyer and Agar.* *The last Judgment but an Inquest of Office.*

Pasch. 5 Fac. Rot. 39. Nihil dicit in Dower. Judicium de recover Seisinam versus præfat. R. de tertia parte Prædict' cum pertin'. Et idem R. in misericordia & averment de dying seised. The Demand was de tertia parte unius messuagii & sexdecim acrarum terræ cum pertin. per l'inquisitionem compertum fuit quod terræ & tenementa prædicta cum pertin. in Brevis prædict. ut inquisition' annex. specificat. sunt & existunt unum messuagium, quatuordecim acras terræ cum pertin. insimul jacen. in L. præd. ad terram præfat. J. ex Australi parte, &c. sunt tertia pars; Et ulterius found the Time of the Dying seised, and the Damages, and the Value, and Costs. It is considered that quod petens recuperet versus præfatum tenentem valorem tertiae partis prædict. cum pertin. a tempore mortis præd. M. quondam viri,

viri, &c. quā quidem valor per tempus præd. in se attingit ad 100 l. Et dampna sua prædicta ultra valorem præd. ad 5 s. 4 d. per inquisitionem præd. superius compert. necnon, &c. quæ quidem dampna, &c. ad 9 l. 13 s. Note; The Jury found the Land in Demand to be of less Quantity than the Demandant had counted. Ex Manuscript. Mri. Brownloe.

Judgment. Execution.

Judgment against the Heir conditionally.

In a Writ of Dower, If the Heir of full Age be vouched by the Tenant in the same County, the Judgment shall be conditional, viz. against the Heir if he have Assets, and if he had none Assets, against the Tenant, and the Tenant over-against the Heir, when he had. 2 Roll. Abbr. 751. But if the Heir be vouched in another County, who entreth into the Warranty, and saith, he hath nothing by Discent, and the Tenant avers that he had Assets, the Demandant shall recover presently against the Tenant generally, and shall leave him to sue over to have Value against the Heir.

How Execution shall be where there is a Lease for Years.

If the Husband make a Lease for Years, rendering Rent, and dies, the Wife shall recover her Dower, and have present Execution of the Land, and thereby she shall have the third Part of the Reversion and of the Rent, and the Sheriff shall serve Execution of the Land, as if there were no Lease for Years; for it may be that the Lease is void, and if the Lease be good, he who claims the Lease may re-enter upon the Land notwithstanding the Recovery and Execution. Godb. 165. Foliamb, Cro. Eliz. 564. Winch 80. Litt. Rep. 293.

One seized of Land in Fee taketh a Wife, and proffered eight Persons, a Writ of Dower is brought against eight Persons, and two confess the Action, and the other six plead to Issue; the Demandant shall have Judgment to recover the third Part of the two Parts of the Land in eight Parts to be divided; and after the Issue for the six found for the Demandant she shall have Judgment to recover the third Part of the six Parts of the same Lands in eight Parts to be divided.

Dower against eight Persons, two confess, and six plead to Issue, how the Judgment shall be.

In *Longvill's Case*, Trin. 16 Car. 2. B. R. It was moved for Amendment of the Assignment of Dower being under Value, and on refusal of an equal Division proffered by the Daughter to him, with Liberty to choose which two Parts he would for the Heir, which the Court ordered, and committed the Sheriff to take 60% of the Lady *Longvil* to execute his Writ of Execution, and Information against him.

Amendment of Assignment of Dower.

Rationabili parte bonorum according to the Custom of London.

H. C. sues E. C. Executrix of her Husband, declares by Bill original in Nature of Debt *rationabili parte bonorum* in the Court of the Mayor and Aldermen of *London*, and alledgeth the Custom of *London* to be, that *quando Civis liber homo de London* dies, his Goods over Debts and Funeral ought to be divided in three Parts, and that the Wife of the Testator ought to have one Part, the Executors the second Part to discharge Legacies, and to dispose in their Discretion, and the Children of the Testator, which were not sufficiently provided for in his Life-time, a third Part; and that the

L

Custom

Custom is that the Plaintiff in this Case ought to bring into Court a true Inventory, and shew before the Mayor and Aldermen, and that she here had brought an Inventory of 18009. 4. and demands a third Part (6000. 4.) of the Executor. And this was removed to the Common Pleas by Writ of Privilege. And *Richardson* said, that the Plaintiff might declare in London without alledging the Custom, for that the Custom is well known there; and a *Precedent* was granted. *Lit. Rep. 324. Honora Cason's Case.*

Where a Freeman dies intestate, one Third of this Estate to go according to the Statute of Distributions.

Freeman's Widow to have her Thirds in the real Estate, unless it were purchased in Trust.

And by that means she may be depriv'd both of the real and personal Estate.

Where a Freeman dies intestate, that third Part of his personal Estate which was, at his Disposal is governed by the Statute of Distributions: If such Freeman be seised of Lands of Inheritance, either by Descent or Purchase, the Widow will be entitled to her Dower or Thirds in them by the Common Law; but where the Husband purchases Lands and has them conveyed to others in Trust for him, the Widow has no Title to Dower in them, because the Estate in Law never was in the Husband; neither can it be looked on as personal Estate after it is laid out in the Purchase of Lands of Inheritance; so that the Widow can have no Interest in it either Way according to a Decree of my Lord Cowper's in the Court of Chancery the 20th of June 1716. between *Ambrose* and *Ambrose*, which Decree was affirmed in the House of Lords the 18th of June 1717. Thus it lies in a Freeman's Power either by laying out his personal Estate in the Purchase of Freehold Lands in Trust, or of Copyhold Lands in his own Name, to deprive his Widow of the most considerable Advantages she might hope for in marrying a Freeman.

But

Enacted by 11 Geo. 1. cap. 18. it is enacted, That it shall and may be lawful to and for all and every Person and Persons, who shall at any Time from and after the first Day of June 1725, be made or become free of London, and so to and for all and every Person and Persons, who are already free of the said City, and on the said first Day of June 1725, shall be unmarried, and not have Issue by any former Marriage, to give, devise, will and dispose of all and their personal Estate and Estates, to such Person and Persons, and to such Use and Uses as he or they shall think fit.

Provided nevertheless, That in Case any Person, who shall at any Time or Times, from and after the said first Day of June 1725, become free of the said City, and any Person or Persons who are already free of the said City, and on the said first Day of June 1725, shall be unmarried, and not have Issue by any former Marriage, hath agreed, or shall agree by any Writing under his Hand, upon or in Consideration of his Marriage, or otherwise, that his personal Estate shall be subject to, or to be distributed, or distributable, according to the Custom of the City of London, or in Case any Person so free or becoming free as aforesaid, shall die intestate, in every such Case, the personal Estate of such Persons so making such Agreement, or so dying intestate, shall be subject to be distributed and distributable, according to the Custom of the said City any Thing hereunto contained to the Contrary in any will notwithstanding.

And if a Freeman of London dies, leaving two Daughters and a Wife, one of the Daughters shall, though after a Division and Partition of the personal Estate, yet the surviving Sister shall

shall have the Whole of the Orphanage Part. *Per Lord Chancellor, Trin. 1713. between Leoffes and Lewen.*

If a Man marries an Orphan who dies under twenty-one, her Orphanage Part shall not survive to the other Children, but shall go to the Husband. Between *Fouke and Lewen, 1 Vern. 88.*

If a Man marries a City Orphan, and her Portion is in the Chamber of *London*, and he dies before her Age of twenty-one; this shall not be looked upon as a *Depositum* for the Husband, but as a *Debitum* or *Chose in Action*, which he not having taken out, or reduced into Possession, must survive to the Wife. *Anne Pheasant's Case, 2 Vent. 340. 1 Chanc. Cases 181. S. C.*

If the Daughter of a Citizen of *London* marries in his Life-time, against his Consent, unless her Father be reconciled to her before his Death, she shall not have her Orphanage Share of his Personal Estate; and it would be unreasonable to take the Custom to be otherwise. *Hill. 1 & 2 Jac. 2. between Foden and Howlet, 1 Vern. 354. per Lord Chancellor.*

The Bill being to have Distribution of the Legatory Part of the personal Estate of a Citizen of *London*, who died intestate; the Defendant, the Widow and Administratrix, pleaded, that by the Custom of the City of *London*, if a Freeman dies intestate and without Issue, his Widow ought to have her Widow's Chamber, and a Moiety of the Rest of the personal Estate, and the Administrator the other Moiety, and set forth the Proviso in the Act of Distributions, that it should not prejudice the Custom of *London*, and that Administration

tion of her Husband's personal Estate was granted to her.

It was affirmed by the Counsel at the Bar, that it had been lately resolved in the *King's Bench*, that the whole Estate of a Citizen of *London* was exempted out of the Act of Distribution; and thereupon the Plea was allowed. But whereas the Defendant had demurred, for that the Distribution ought to be made in the Spiritual Court, the Lord Keeper over-ruled the Demurrer; for that the Spiritual Court in that Case had but a lame Jurisdiction; and there being no negative Words in the Act of Parliament, he thought a Bill for Distribution very proper in this Court. 1 *Vern.*

C H A P. XII.

Of Jointures.

The Nature and Reason of the Statute of H. 8. cap. 10. of Jointures. Construction of the said Act relating thereunto, What States are Jointures within the said Statute or not. What is a good Jointure within the Statute of 11 H. 7. and what Alienation of the Wife is within that Statute, illustrated in several adjudged Cases, What Agreement or Waiver a Woman may make as to her Jointure; and what shall amount to an Agreement or Refusal. Pleadings.

As for the Nature and Reason of Jointures.

IT was a Rule at Common Law, that a Right or Title, which any had to any Lands or Tenements of any Estate of Inheritance or Freehold, might not be barred by Acceptance of any Waiver of collateral Satisfaction or Recompence; and this was the Reason that no collateral Recompence (as a Jointure) made to the Wife in Satisfaction of her Dower was any Bar of Dower at Common Law. Now before the Statute of 27 H. 8. cap. 10. (of *Uses*) the greatest Part of the Lands in *England* was conveyed to divers Persons to *Uses*; and forasmuch as a Wife was not dowable of *Uses*, her Father or Friends procured the Husband to take an Estate of his Feoffees or others seized to his Use, to him and his Wife, before or after Marriage, for their Lives or in Tail, for a compleat Provision for the Wife after the Death

Death of the Husband. Then comes the Statute of 27 H. 8. which transfers the Possession and Estate of the Land to the Use, by which the Husbands were seised accordingly; and by Consequence, if other Provision had not been made, the Wives would have their Dowers as well as their Jointures; and for this the Branches concerning Jointures were added to the said Statute of 27 H. 8.

The Act expresseth plainly five Forms of the Limitation of Jointures; as,

1. To the Baron and Feme, and to the Heirs of the Husband.

2. To the Baron and Feme, and to the Heirs of their two Bodies.

3. To the Baron and Feme, and to the Heirs of the Body of one of them.

4. To the Husband and Wife for their Lives.

5. To the Husband and Wife for the Life of the Wife.

But there are other Estates which are within the said Statute, though not mentioned; and that comes now under Consideration.

What Estates are Jointures within the Statute of 27 H. 8. or not; or what is a good Jointure.

1. In Respect of the Estate limited.

2. In Respect of the Manner and Frame of the Conveyance.

3. In Respect of the Consideration.

Besides the five Examples above mentioned, there are other Estates that are not within the Statute: As,

When an Estate is limited to a Man for Life, the Remainder to the Woman for Life; tho' the Woman have no Joint Estate with her Husband, yet this Estate is as beneficial for her;

and so was *Ashton's Case*, *Dyer* 328. *Ashton* in Performance of Marriage-Covenants between his Son and one *A.* makes a Feoffment to the Use of *A.* for Life for her Jointure, and after they intermarry, the Husband dies; this was a Jointure within the Intent of the Act, though the Examples in the Act are of a joint Estate.

It must be immediate after the Husband's Death in Creation.

But the Estate, which by Force of this Act shall be in Lieu and Bar of Dower, ought by the Limitation to take Effect after the Husband's Death immediately; and therefore if the Husband makes a Feoffment in Fee to the Use of himself for Life, and after to the Use of *B.* for his Life, and after to the Use of his Wife for her Jointure, this is not within the Act, altho *B.* dies before the Husband; for a Jointure must be an immediate Estate after the Husband's Death in Creation; and shall not be aided by any Event subsequent, or by Matter *ex post facto*. It was a Case put to my Lord Chief Justice *Bridgman*, when he was called up to the Chief Justice: A Man makes a Feoffment in Fee to the Use of himself for Life, Remainder to the Use of his second Son for Life, and to the Use of such Woman as he shall marry the Remainder to the Heirs of his second Son; the Father dies, the second Son takes Wife and dies; it is no good Jointure, and the Wife may bring her Dower; for the Estate which was limited to the Wife ought to be considered as it was at the Time of the Creation of the Use; and at the Time of the Creation it cannot be said to be a Jointure within the Statute, because the Husband by Possibility might have died before the Father, and then the Wife should not have an immediate Estate. *Sid. p. 34. 5 Co. 2. Wind.*
33.

1. In some Cases, though the Wife hath immediately Freehold after her Husband's Decease, yet it is not a good Jointure to bar Dower; as if a Man make a Feoffment in Fee to the Use of himself for Life, the Remainder to his Executors for Years, the Remainder to his Wife for her Jointure; this is no good Jointure. *Winch 33.*

2. The Duke of Somerset purchased Lands to him and the Dutchess his Wife, and to the Heirs Males of their two Bodies; this is a good Jointure within the Act. *Dyer 96.*

3. It must be an Estate for Life of the Wife; *It must be an Estate for the Life of the Wife.* and an Estate to the Wife for Life upon a Condition, is a good Jointure within the Act, if the Wife after the Death of the Husband accept it; for it was agreed that a Jointure is a competent Livelihood of Freehold for a Woman, to take Effect presently after the Death of the Husband for the Life of the Wife, if she herself be not the Cause of the Determination or Forfeiture of it. And therefore

if the Husband make a Feoffment to the Use of his Wife *pur autre vie* for her Jointure, this is not within the Act; and this may determine during her Life without any Default in her.

4. If a Man make a Feoffment in Fee to the Use of himself for Life, and after to the Use of his Wife, *durante viduitate*, this is an Estate for Life to her, if she Will; and therefore it is a good Jointure within the Act. And if the Condition bind her to any unreasonable Thing, she may waive it; but when after the Death of the Husband she enters and accepts the conditional Estate for her Jointure, she is barred of her Dower. *4 Co. 3.*

5. An Estate in Fee-simple conveyed to the Wife for her Jointure, and in Satisfaction of her Dower, is a Jointure within the Equity of the Act.

Acceptance of a conditional Estate for a Jointure, a good Bar of Dower.

Act of 27 H. 8. for this is a competent Life-
 hood for the Wife of an Estate of Freehold
 to take Effect presently after the Death of the
 Husband for all her Life and more; but it is
 not a Jointure within 11 H. 7. c. 10. which re-
 strains the Alienation of Women; and to re-
 strain an Estate in Fee-simple, that it may not
 be aliened, is against a Rule in Law, and clearly
 out of the Intention of the Act. 4 Co. 3. b.

*A voluntary
 Settlement be-
 fore Marriage
 shall not pre-
 judice the
 Wife's Joint-
 ure.*

... Sir Robert Reeve, on his Marriage with his
 second Wife, settled a Jointure of divers of his
 Lands in Suffolk, which he had before charged
 with a Daughter's Portion by a former Wife
 (viz. 3000 l.) and by his Will he mentioned
 that the said Jointure-Lands were so incum-
 bred, and therefore devised other Lands to his
 Wife in Lieu of them, in Case she would ac-
 cept the same; but it appearing after his Death
 that those other Lands were not equivalent
 Value to the Lands in the Jointure, she retain-
 ed her Jointure, and was not prejudiced by the
 Charge of the Daughter's Portion, it being but
 a voluntary Settlement. 2 Vent. 363.

*A Covenant to
 release all De-
 mands to the
 Wife's Guar-
 dian after the
 Marriage,
 void.*

... It was covenanted before Marriage, that the
 Husband should within two Days after his Mar-
 riage release his intended Wife's Guardian of
 Accounts of the mesne Profits of an Estate that
 belonged to her. Per Cowper Lord Chancellor.
 Admitting there was no Surprize or Conceal-
 ment, yet this Covenant ought to be set aside
 as extorted from the Husband, who could not
 have the Lady but upon these Terms; and
 where-ever a Father or Mother, or Guardian,
 insists upon private Gain or Security for it, and
 obtains it of the intended Husband, it shall be
 set aside; and it is a settled Rule, That if the
 Father on the Marriage of his Son take a Bond

him, that the Son, shall pay him so much, *A Bond to pay his Father a*
 is void. *Salk. Rep. 158.* *Sum of Money*

Where one covenanted on the Marriage of *after the Mar-*
 a Daughter, to pay her and the intended *riage, void.*

20 l. per Annum, it was held by the *Covenant on*
 Court of B. R. That this should be construed *Marriage to*
 an annual Payment to continue during their *pay 20 l. per*
1 Sid. 122. Hook ver. Swan. *Annum con-*

The Defendant having promised to assure *Life.*

again Copyhold Lands to the Plaintiff, if he *Promise to as-*
 should marry his Daughter; it was held, That *sure Lands on*
 the Plaintiff need not give Notice of the Mar- *Marriage,*

riage, or aver any special Request for Perfor- *Notice need*
 mance of the Promise, but the Defendant must *not be given of*
 make the Settlement at his Peril. *Cra. Jac. 102.* *the Marriage.*

The Duke of Buckingham made a Jointure to *Power of ma-*
 the Dutchess with Power of making Leases for *king Leases by*

Years in Possession, and died; The Dutchess *a Jointure*
 afterwards married my Lord Aurim; and it was *may be exe-*

held, That this Power of making Leases might *cut by the*
 be executed by the Husband and Wife of *Feme with her*

the second Husband. *second Hus-*
 in Possession; but not of such Lands *band.*

in Lease: The Duke of Buckingham *In Cancel. 1*
 and his Rem. *1*

is a good Jointure within the Statute of *17. cap. 10.*

and what Alienation by the *Statute.*

Bertram seised in Fee having three Daugh-

ters. Indenture between him and R. B. in *Consideration of 400 l. paid by the said R. B.*

Confederation of a Marriage had be- *between R. B. Son and Heir of the said R. B. and*

the eldest Daughter of the said W. Ber- *tram, and the Preferment of the Blood of the*

trams, covenanted to stand seised to the Use *of*

of Robert the Son, and the said Margaret his Wife, and the Heirs of her Body; and for Default of such Issue, to the Use of his other Daughters and their Issues, the Remainder to the Heirs of the said *W. Bertram*; the Husband dies having no Issue, and *Margaret*, by Fine, convey'd it to the Defendant, on whom he re-enter'd as a Forfeiture within 11 H. 7. and it was resolved she was not a Jointress within that Statute, notwithstanding the 400 *l.* paid by *R. B.* the Father; for the Land moved from *W. B.* the Wife's Father, and the Preferment of the Blood of the *Bertrams* shews the Intent that the Husband's Heirs should not be preferred, but the Wife's; for the Meaning of the Makers of that Law was only to disenable Women, who have an Estate in Dower, or for Life, or in Tail jointly with their Husbands, or only to themselves, of the Inheritance or Purchase of their Husbands, or given to them by the Ancestors of their Husbands, or other Persons seised to the Use of such Husbands, or their Ancestors, when they became sole, or with any after-taken Husband from making such Alienations, whereby the Heirs of such Husbands might, and before making of that Law were frequently disinherited. But in this Case, the Advancement is by the Ancestors of the Wife, and is not of the Purchase of the Husband or his Ancestors. *Cro. Car.* 244. *Copland and Pyot, Jones Rep.* 254.

The Meaning
of the Act of
11 H. 7.

Fine and Render for 1000 Years is within the Statute.

Feme Tenant in Tail within the Statute of 11 H. 7. accepted a *Fine sur Connaissance de droit come ceo, &c.* and by the same Fine render'd the Land to the Conusor for 1000 Years; this is within the Statute. 3 Leon. 78. *Barker and Taylor.*

If a Woman hath Title of Dower, if before she be endow'd she will enter and levy a Fine, so long as is within the said Statute, and yet she be Tenant in Dower. 3 Leon. 78. *Barker and Taylor.*

The Bishop of Exeter, in Consideration of good Service done by N. T. for many Years, gives Lands to N. T. and Sybil his Cousin, in Tail, and a Marriage was then intended to be solemnized between the said N. and Sybil, which was solemnized; they had Issue, N. dies, Sybil marries again, she and her second Husband alien the Lands. *Per Curiam*; This was a Jointure within the Statute of 11 H. 7. for it was not a Gift by the Husband, nor any Ancestor of the Husband; and the Consideration of Service is no such Purchase as the Statute intends, for it is not so valuable, but a voluntary Gift of the said Bishop. *Cro. Jac.*

Gift by the Husband or any Ancestor of the Husband.

173. *Ward and Walthew. Telv. 101. 1 Anst. 137.*

Where the Land moves from the Husband, yet the Remainder of the Estate is to a Stranger, so as it could be no Prejudice to the Heir of the Husband, the Alienation of the Land is no Forfeiture, as *Cro. Eliz. 224.*

If it be no Prejudice to the Heir of the Husband, it is not deins le Statute.

Mish. 28 & 29 Eliz. in *Laughter and Humble's Case* it was agreed, That an Estate in Fee given by the Husband to the Wife, is not a Jointure within 11 H. 7. for that any collateral Heir might inherit it, and the Statute was made for the Benefit of the Issues between them.

The Case was: A Man and Woman being joint tenants in Fee of a Manor, intermarried, they levied a Fine thereof to a Stranger, who gave it to them in Tail; they have Issue three Daughters, the Baron dies, the Feme takes a second Husband, and they levy a Fine, and retake

Take it in special Tail; the Feme dies Jan
 Issue by the second Husband; the Daughter out
 fers on Lease for Years of the second Husband
 and distrained a Copyholder for Rent. And it
 was a Question, whether the first Estate was
 within the Statute of 11 H. 7. Per Cur-
 iam; For one Moiety it was, but for the other
 Moiety it was not.

*What Estate
 shall be said
 given by the
 Ancestor.*

Covenant to stand seised to the Use of my
 Brother and his Wife for their Lives; it is a
 jointure within the Statute of 11 H. 7. as given
 by the Ancestor of the Husband; and it is with-
 in the Words of 27 H. 8. which exclude Dowry
 Plowd. 3071 a.

D. K. seised in Fee of 20 l. per Annum Lands
 having only two Daughters, covenants with
 J. K. in Consideration of a Marriage between
 the said J. K. and his Daughter M. and in Con-
 sideration of 115 l. to be paid by J. K. to assure
 the said Lands to the Use of himself for Life,
 and after to the Use of J. K. and M. and the
 Heirs of their two Bodies, the Remainder to
 the Heirs of the Body of Margaret; the Re-
 mainder to A. in Fee; the Marriage took Effect
 J. K. dies, M. takes a second Husband, and
 they alien by Fine: And so, the Heir of the
 Body of J. K. and M. enters. Per Curiam:
 This not a jointure within the Statute of 11
 H. 7. because the Land moved from the Wife's
 Father, and her Advancement in Marriage is
 intended the Cause of the Gift, and not the
 Money. Cro. Jac. 624. Kinkston and Lloyd
 Jones Rep. p. 13.

*Though a Con-
 sideration of
 Marriage be
 joined with a
 Consideration
 of Money, yet
 is a Jointure
 within the
 Statute.*

But a Conveyance by the Husband or his
 Ancestor in Consideration of a Marriage, tho'
 it be joined with a Consideration of Money,
 yet is a jointure within the Statute. R. G. seised
 in Fee by Indenture, covenants with R. B. as

Consideration of 200 l. paid by R. B. as
 Consideration of a Marriage between L. his
 Son, and Ann the Daughter of R. B. to
 the Land to the Use of the said L. and
 the Heirs of the Body of the said
 L. to be begotten, and to his right Heirs
 Marriage takes Effect, the Father dies be-
 fore Affurance, L. makes the Affurance, and
 they have Issue R. G. L. and his Wife
 by Fine, R. the Son enters as for a Forfeiture
 this is a Jointure within 11 H. 7. But
 the Question was, This being a Jointure
 within the Statute, Whether the Alienation by
 the Feme with the first Husband, who limited
 it as a Forfeiture? *Per Curiam*: It is no For-
 feiture neither within the Words, nor within
 the Intent of the Statute; not within the
 Words, for it is, the Woman being sole or
 any after taken Husband; *aliter*, had it
 been a Conveyance by the Father: It is not
 within the Intent, because the Husband joined
 in the Alienation, and the Statute did not in-
 tend but to provide that Disinheritance should
 be done to the Heirs of the Husband. *Cro.*
474. Kinkman and Tompson: . . .
 a Man and Feme seised in Fee-tail in the
 Name of the Wife, they join in a Fine and have
 it returned back to them and the Heirs of their
 Bodies engendered: The Baron dies, the Feme
 marries her second Husband alien, they may, and
 the Heir of the first Husband cannot enter,
 though it is within the letter, yet it is not
 within the Equity of 11 H. 7. *Plowd. Eyston*
100. Jones 253. Jenkins and Young. . .
 a Man, upon his Marriage, made a Settlement
 whereby he was Tenant for Life, then
 his Wife in Special Tail, of Lands of 4000 l.
 of Annual Value, with Remainder to the
 right

*Fine and Ren-
 der.*

right Heirs of the Husband; the Husband and Wife joined in barring this Settlement, and a new Settlement was made in this Manner, *viz.* to J. S. and his Heirs, in Trust as to Lands of 150 *l. per Annum* for the Wife and the Heirs of her Body; and for Want of such Issue, in Trust for the Husband and his Heirs; the Husband died without Issue, and the Wife suffered a Recovery, and devised the Lands for the Payment of her Debts, and died without Issue; on a Bill brought by the Heir of the Husband, against the Defendants, Creditors of the Wife; the Question was, Whether this was such a Jointure made on the Wife, so as to make the Recovery a Forfeiture within the Statute 11 Ed. 7. For the Defendants, it was objected, that a Court of Equity ought not to give any Assistance, because the Statute makes the Recovery a Forfeiture of her Estate, and gives a Remedy by Way of Entry; and in this Case she has only a Trust, and no Estate to Forfeit; it was likewise urged, that this Case was out of the Words and Meaning of the Statute; for the Limitation here is to the Wife in general Tail; and no Failure of Issue of that Marriage, her Issue by any other Husband would have had the Land, and might without Doubt have suffered a Recovery, and barred the Remainder; and the Statute only intended to provide for the Issue of the Husband, whose the Lands were: It was farther urged, that these Lands could not be said the Husband's; for the Wife by parting with her former Settlement, which was 400 *l. per Annum*, for this of 150 *l. per Annum*, was a Purchaser of those Lands; and if the Wife in Consideration of this Settlement had sold Lands of Inheritance of her own, it would not have been within the Statute.

On the other Side it was said, that this was to aid a Forfeiture; but as the Statute makes the suffering a Recovery a Forfeiture, and gives an Entry to the Person that has the next Estate; so in another Place it makes all Recoveries suffered by a Jointress void; and upon that Clause it is proper to come into Equity, to have an Execution of the Trust; and this Case is within the Words of the Statute; for the Statute says, any Estate limited to the Wife, or to her Use; and this Statute was before the Statute H. 8. of Uses, at which Time a Use was the same Thing that a Trust is now; next, the Statute says, limited for Life or in Tail; now a general Tail is as much an Intail as a Special one, and as much within the Words of the Statute, and the Statute intended to provide for the Remainder-man, as well as the Issue. The Objection of her being a Purchaser, is quite to take away the Statute, for so is every Jointress; and if she had kept her former Jointure, that had been under the same Restraint; and of the same Opinion was my Lord Keeper, and decreed accordingly. Trin. 1700. between Symson and Turner.

On a Motion to stay a Jointress, Tenant in Tail after Possibility, &c. from committing Waste; the Court held that she being a Jointress within the 11 H. 7. ought to be restrained, being Part of the Inheritance, which by the Statute she is restrained from aliening, and therefore granted an Injunction against wilful Waste. Hill. 1701. between Cook and Winford.

A. charges Land in D. with a Portion for a Daughter by a first Venter, and then marries, and settles Part of those Lands as a Jointure on a second Wife, who has Notice of the Charge;

M

and

and *A.* believing that the Portion would take Place of the Jointure, by Will gives other Lands to the Wife in Lien thereof; and the Wife, by Combination with the Heir, refuses to accept of the Devise; the Daughter shall hold the other Lands which descended to the Heir, till satisfied her Portion. *Hill.* 1683. between *Reeve* and *Reeve*, 1 *Vern.* 219.

A. in Consideration of a Marriage Portion, articles to settle a Jointure, and dies before the Portion paid, or Settlement made; and the Wife takes out Administration to him, and so becomes entitled to the Money, and then brings a Bill against the Heir of the Husband, to have the Jointure settled, she shall have no Relief, for she is not intitled to the Jointure and Money too; but the Reporter adds a *Quære*; for she is intitled to these two Demands in Distinct Capacities, and Debts may hereafter appear to exhaust the Assets; and in Case the Husband had actually received the Portion, and it had been in his Possession, she would have had it as his Administratrix. *Trix.* 1687. between *Meredith* and *Jones*, 1 *Vern.* 463.

But if *J. S.* before Marriage, articles to settle a Jointure on his intended Wife, and the Marriage is consummated, and the Husband dies before any Settlement made, an Execution of the Articles will be Decreed in Equity. 1 *Vent.* 343.

J. S. gives a voluntary Bond after Marriage, to make a Jointure to his Wife, and he makes a Jointure accordingly, and the Wife gives up the Bond, and the Jointure is evicted, the Jointure shall be made good out of the Personal Estate, there being no Creditors; for the Delivery up of the Bond by a Feme Covert could
no

Way bind her. *Hill. 1686. between Beard and Nuthall, 1 Vern. 427.*

A. Feme Covert joins with her Husband in a Fine and Mortgage of her Jointure Lands, there results a Trust for her when the Mortgage is paid, to have the Lands again. *2 Chan. Cases 161.*

So if a Feme Covert joins with her Husband in a Fine and Mortgage of her Jointure Lands, she may redeem; and if she pays more than a third Part of the Principal Money, her Executor shall hold the Land till reimbursed, *2 Chanc. Ca.*

So if a Jointure is made of Lands which are mortgaged, the Wife may redeem, and her Executor shall hold over till repaid with Interest. *1 Chanc. Cases 271. 2 Vent. 343. S. P. decreed.*

B. deviseth Lands to his Wife in Tail, Remainder over, and dies, the Wife with the second Husband aliens by Fine and dies; this is within the Words, but not within the Intent of the Statute; for the Statute intends only of Inheritance *must be limited to the Husband and his Heirs.* Lands given for the Advancement of the Wife, and the Remainder of the Lands is limited to a stranger, and so shall not be intended to be limited for a Jointure, where no Inheritance is limited to the Husband and his Heirs, so that the Entry of the Heir is not lawful. *Cro. Eliz. p. 2. Fisher and Pitful. 1 Leon. 261, 262. Mesme Case.*

The Husband seised of Lands *in jure uxoris*, Rent in Lieu they levy a Fine, the Conusee grants a Rent of the Land. to them in Tail, the Husband hath Issue and dies, the Wife aliens the Rent, it is out of the Statute of 11 H. 7. for the Rent comes in Lieu of the Land. *Cro. Eliz. p. 2. cited in Foster's Case.*

Feoffment of the Feme, tho' to him who had the Reversion in Fee, is a Forfeiture.

Baron and Feme being Tenants in Tail upon the Purchase of the Husband, they have Issue two Sons, the Husband makes a Feoffment to the Use of himself for Life, the Remainder to the Wife for her Life, the Remainder to the second Son and his Heirs; the Husband dies, the Wife enters, and makes a Feoffment to the Issue of the second Son; the eldest Son may enter, for it is a Forfeiture within the Statute of 11 H. 7. and this Feoffment by the Feme, though it be to him who had the Reversion in Fee, is a Forfeiture within the Statute. *Sid. p. 63. Jones and Philpot.*

A Man and a Woman being Joint-tenants in Fee of a Manor, intermarried, and after levied a Fine thereof to a Stranger, who rendred it to them in Tail; they have Issue a Daughter, the Baron dies, the Feme takes a second Husband, and they levy a Fine, the Remainder to them in Tail special. *Per Curiam*: For the one Moiety it is a Forfeiture within the Statute of 11 H. 7. and for the other, not. *Cro. Eliz. 524. Laughter and Humfries.*

Fine and Render.

A Woman Tenant in Tail within the Statute of 11 H. 7. accepted a Fine *sur Cognisance de droit comé ceo*, and by the same Fine rendred the Land back to the Cognisor for 1000 Years, this is within the Statute; for this is as mischievous as a Discontinuance. *Godbolt 6. 3 Co. Sir George Brown's Case. Moor 222. 2 Leon. 168. Vide supra Barker and Taylor's Case.*

Of Estates devised by Will.

Some have been of Opinion, that no Estate devised by Will can be a Jointure within 27 H. 8. for every Jointure by that Act is intended to be made before, or during the Coverture; but

a Devise takes Effect after the Death of the Husband: But in *Leak and Randal's Case*, Mich. 28 & 29 Eliz. It was adjudged *contra*, with this Difference: In as much as a Devise imports a Consideration in itself, and therefore a Devise may not be averred to be to the Use of another than the Devisee, unless it be exprest in the Will, no more may a Devise be averred to be for a Jointure, unless it be exprest in the Will. But if a Man devise Lands to his Wife for Term of her Life, or in Tail, &c. for her Jointure and in Satisfaction of her Dower, this is a Jointure within the 27 H. 8: for this is within the Equity of the said Act, 4 Co. *Vernon's Case*.

In *Vernon's Case* Lands were settled on J. S. and J. B. and their Heirs, to the Use of himself for Life, and after his Decease, to the Use of his Wife for Life, &c. and avers in pleading, that the said Estate limited to the Wife was for her Jointure, but it was upon Condition that she should perform his Will, yet it may be averred to be for her Jointure, for one Consideration may well stand with another, and although it be not exprest in the Deed, yet it may be averred.

Of the Feme's waving or agreeing to her Jointure.

If a Jointure be made to the Wife before Coverture, after the Death of the Husband the Wife may not wave it, and take her Dower, as she may do by a Jointure made during the Coverture; And

If Lands are conveyed to a Woman before Marriage for Part of her Jointure, and after Marriage more Land is conveyed to her for

her full Jointure, and in Satisfaction of all her Dower, and after the Husband dies; in this Case, if the Woman waves the Land conveyed to her Use after Marriage, she shall have the Land conveyed to her before Coverture, and her Dower also in the Residue; for Land conveyed to the Wife for Part of her Jointure, or in Satisfaction for Part of her Dower, is no Bar for the Incertainty, of any Dower.

If a Woman enter and agree to her Jointure made after Marriage, then she cannot wave it: But,

If she bring a Writ of Dower and had Judgment of a third Part, she hath estopped and concluded herself to claim any Estate; for by this she hath affirmed her self to have but a Title of Dower.

Acceptance of Dower by Deed indented shall conclude the Wife of her Right.

By bringing her Writ of Dower of the Residue, she hath tacitly affirmed that she had not agreed to any Jointure made to her.

A Man Covenants to settle Lands of such a Value as a Jointure, and this Covenant is omitted in the Settlement, yet it subsists in Equity; but the Value of the Lands is not to be estimated according to the present Value, but as they were at the Time of the Jointure settled, unless the Covenant be so. *Hill. 1683. between Speake and Speake, 1 Vern. 217, 218.*

If there be a Jointress, and a Covenant that her Jointure shall be of such a yearly Value, and it falls short; though her Estate be not without Impeachment of Waste, yet she may commit Waste, so far as to make up the Defect of the Jointure, and Equity will not Prohibit. *Mich. 1698. between Carew and Carew, at the Rolls.*

J. S. made a Settlement on his eldest Son for Life; with Remainder to his first and other Sons in Tail, Remainder over, with Power for his Son to appoint any of the Lands not exceeding 100 *l. per Annum*, to any Wife he should afterwards marry, for a Jointure, (the Father being under an Apprehension that he was then married to a Woman that the Father liked, and had no Intention his Son should provide for); the Father died, and the Son married that Woman (though there was strong presumptive Proof that he was married to her before,) and after Marriage appointed certain Lands to Trustees, in Trust for her, for a Jointure, and covenants, that if they were not of 100 *l. per Ann.* Value, that upon Request made to him any Time during his Life, he would make them up so much out of other Lands in his Power; he lived for several Years, and no Complaint was made, that the Lands were not of that Value, nor Request to make it up, and he died without Issue, on a Bill brought by the Widow to have the Jointure made up 100 *l.* the Lord Keeper said, that a Provision for a Wife or Children, was not to be considered as a voluntary Covenant; and therefore Decreed a Deficiency to be made up, notwithstanding the Circumstances of the Case, and her Neglect in not requesting it during Coverture; for the Neglect of a Feme Covert cannot be imputed to her. *Hill. 1701. between Fathergill and Mothergill.*

A. in the Life-time of his first Wife, settles Lands to the Use of himself for Life, Remainder to his First and other Sons in Tail, and the Wife dies without Issue; and A. on his second Marriage, in Consideration of a Portion paid, agrees to settle Part of the Lands as a

Jointure on his second Wife; the Court will set aside the first Settlement, as fraudulent against the Jointress, who is a Purchaser for Valuable Consideration. 1 Chanc. Ca. 100.

If the Heir brings a Bill against a Jointress to discover Deeds and Writings, he is not intitled to see them, unless he confirms the Wife's Jointure, though the Jointure was made after Marriage. 1 Vern. 479.

So if a Bill is preferred against a Jointress to answer, whether her Husband had any other Title than as Assignee of a Mortgage, and she denies that she had any Notice of this Mortgage, and says, that her Husband told her he was in by Descent; she shall not be obliged to answer, whether her Husband had any other Title than as Assignee of the Mortgage. Mich. 1715. between Stephens and Gaule, 2 Kern. 701.

Pleading.

In a Writ of Dower the Tenant pleads, *B.* being seised in Fee made a Feoffment to the Use of himself for Life, and to *Dorothy* his Wife for Life for her Jointure, the Remainder over to a Stranger, and *Dorothy* held in by Survivor claiming the said Estate. The Demandant replied, That before the said Feoffment, the said *B.* covenanted to stand seised of the same Land to the Use of himself in Tail, the Remainder to his Wife for Life, the Remainder to a Stranger in Tail, and afterwards made the Feoffment *prout*, and then died *sans* Issue, and afterwards she entred by the Indenture, and was seised by Remitter: To which the Tenant rejoins that she held it claiming her Estate by the Feoffment in Jointure, and demands Judgment, Whether

whether against that Claim she should be remitted? The one Question was, whether the Rejoinder be good without traversing the Intail claimed in the first Estate, alledged in the Replication, or whether the Demandant ought to have taken a Traverse, because the Tenant in Bar pleads an Entry claiming that Estate by the Feoffment? *Per Curiam*: The Tenant ought to have taken a Traverse to the Matter alledged in the Replication; and this is Matter of Substance; and by the Law, (*per Curiam*) she shall be remitted for the Benefit of him in Remainder, and *volens volens* she is in of her first Estate, and that it is not any Jointure, because it was to him after an Estate-Tail. *Cro. Jac.* 498. *Hob.* 71. *Sirley and Wood.*

The Statute of Uses hath a general Purview, that Jointures made for Wives, without distinguishing before or after Coverture shall bar her, and then comes with a proviso, that if it be made during Coverture she may retain it, and take her Dower, which is a Kind of Remedy provided for her out of the Generality of the Law, and therefore must be pleaded by her. *Hob.* 71.

Where the Tenant pleaded a Jointure made to the Demandant, and Acceptance of it after the Husband's Death, the Demandant may plead a Refusal after the Death of the Husband without traversing the Acceptance; for it was not material of her Part to plead, but it must rise of the Part of the Refuser. *Hob.* 71.

She must plead specially that the Jointure was made during Coverture, to have her Dower.

C H A P. XIII.

Of Fines and Recoveries.

Of a Fine levied by a Feme Covert as a Feme sole, and the Operation of it. The Reason why a Feme Covert shall be barred by the Fine. The Operation of a Fine by Baron and Feme illustrated by several Cases of Commissioners taking a Fine of a Feme Covert Infant. Of the Time of Acknowledgment. Where a Feme Covert shall be examined or not. Where a Feme Covert shall be barred by Fine and Non-claim. Of the Declaration of Uses by a Feme Covert. Of a Fine levied to Baron and Feme and the Operation of it. Of a Common Recovery. How a Feme Covert may be Tenable to a Præcipe. A Feme Covert barred by Common Recovery. Whether a Feme Covert in passing a Recovery ought to be examined privately. Recovery by Baron and Feme with Age, and Appearance by Attorney, if it be Error. Of Recovery by Default.

Fines levied by a Feme Covert, as a Feme sole, and the Operation of them.

The Reason why a Feme Covert is bound by her Fine.

THOUGH by the Law of Nature the Wife is put under the Obedience of her Husband, and Nature hath submitted her Will to his, and therefore will not bind her by her Acts joining with her Husband, because they are judged his Acts and not hers, in that she wants a Free Will; yet the Law of the Land for Necessity-Sake of Commerce, and the like, by a Law of Policy makes bold with this Law of Nature in a special kind; and therefore allows a Fine levied by the

Baron

Baron and Feme, because she is examined of her Free Will judicially by an authentick Person trusted by the Law and the King's Writ, and so taken in a sort as a sole Woman; so also when she comes in by Receipt.

If a Woman Covert levy a Fine alone as a Feme sole, this shall bind her by the Reason before given, but her Husband may defeat it for himself and her too; but she shall not be received to say she was covert, tho' her Husband shall; and he may enter and restore the Land to himself and his Wife both. *Hob. 225. 7 Co. 8.*
Countess of Bedford's Case.

But if a Feme Covert levy a Fine, as a Feme sole, if her Husband die, she shall not defeat it, but the Husband may defeat it during his Life.

254. in Haywood and William's Case. So H. 4. 23. If a Feme Covert levy a Fine, as a Feme sole, if the Husband defeat it not, this shall bind her and her Heirs for ever. If a Covert take a second Husband, and they levy a Fine, this shall bind her and her Heirs for ever. *7 H. 4. 24. 9 H. 4. 23. 9 H. 6.*

But in both these Cases the Husband may defeat it; and if the Husband avoid the Fine, he shall avoid the Fine against the Wife and her Heirs perpetually.

If a Woman levy a Fine by the Name of A. Wife of J. S. this Fine is merely void. *Quia constat per le Record, that she is covert. Sid. 122.*

If J. S. with the Wife of another, levies a Fine, by the Name of J. S. and Jane his Wife, of the Inheritance of the Feme, and he who is the Husband comes into Court and shews the Matter, and prays to stay the Fine, yet the Court shall not stay it, for the Court shall not determine the Loyalty of Matrimony; and if the Truth be so, that she is not the Wife of J. S.
One with another Man's Wife levies a Fine, the Court will not stay it.

J. S. it shall not hurt the Husband. *Trin. 7 Jac. 1*
B. R. Keblethwait and Ward.

The Court would not stop a Fine taken of a Feme Covert when she was dead. *1 Roll. Abr. 114. cited 1 Vent. 48.*

If the Husband, seised in Tail of Land for valuable Consideration, bargain and sell this to another in Fee, and covenant that he and his Wife shall levy a Fine for better Assurance; and it is agreed that 30 L. Parcel of the Consideration shall be paid to the Husband upon the Consuance of the Fine by the Baron and Feme; and after they acknowledge a Fine before the Judge in the Circuit, and the 30 L. is paid and received by the Wife, the Husband being sick in Bed, and the Husband dies before the Term, and upon this the Wife stays the Passing of the Fine, and after brought a Writ of Dower, the Bargaineer shall not have any Remedy in Equity against the Dower, for that it is against a Maxim in Law, that a Feme Covert shall be bound without a Fine. *1 Roll. Abr. 375. Hodges and Lun.* But the Court agreed, if the Wife had any Personal Estate, as Executrix or Administratrix to her Husband, she shall be liable for this; and thereupon a Commission was granted to enquire of Assets.

Fine acknowledged by Baron and Feme before a Judge in the Circuit, and on Bargain and Sale, and Baron died before the Term, the Vendee has no Remedy in Equity.

The Operation of a Fine by Baron and Feme.

When Baron and Feme join in a Fine of Lands, it shall be intended the Inheritance of the Wife, if the Contrary be not shewed.

Baron and Feme are Tenants in Tail, as Lands are given to J. B. and Eliz. his Wife, and to the Heirs of their two Bodies begotten, the Remainder in Fee to the said J. B. J. N. levied a Fine thereof with Proclamations come see, &c.

J. N.

J. N. dies; after his Death, and within five Years, *Elizabeth* enters claiming her Estate. It was adjudged, that the Entry of *Elizabeth* was lawful by the Act of 32 H. 8. cap. 28. whereby it is enacted, That no Fine, Feoffment, or other Acts, &c. or done by the Husband only, of any Lands, &c. being the Freehold or Inheritance of his Wife, during the Coverture between them, shall in any wise be or make any Discontinuance thereof, or be prejudicial or hurtful to the said Wife or her Heirs, &c. Though the Words in the Act be, The Freehold or Inheritance of the Wife, and the Lands in this Case were the Freehold and Inheritance of the Husband as well as the Wife, yet because it was in equal Mischief, it was adjudged to be within the Statute. 2 Inst. 681. So is *Hob.* 257, 259. If Baron and Feme be Tenants in special Tail, the Baron's Fine is a clear Bar to the Issue by 32 H. 8. though the Wife may enter, if she survive, and though the Wife be remitted, if any Estate be limited to her upon her Husband's Fine; and when the Wife enters upon the Conusee, she is remitted to her own Intail, but it is not to be aliened nor descend; descend it cannot, because the Husband's Fine bars; and aliened it cannot be, because it was aliened before. Vide more in *Hobart*, *Duncomb* and *Wingfield's* Case.

The Statute of 32 H. 6. cap. 28. explained

If Baron and Feme be Tenants in special Tail, and the Baron only levy a Fine, the Feme's Estate-Tail is only turned to a Possibility, and only reducible by Entry, if she survive. *Hob.* 257, 259. When the Baron dies, the Feme by her Entry becomes Tenant in Tail again, and not Tenant in Tail after Possibility of Issue extinct, tho' the Estate-tail cannot descend.

Baron and Feme Tenants in special Tail, Baron levies a Fine, quid operatur.

*Feme by Fine
bars herself of
a Possibility.*

R. E. seised in Fee, levied a Fine to the Use of himself for Life, and after to the Use of such a Wife as he shall marry, and shall survive him; he and his Wife levy a Fine to a Stranger; the Baron dies, the Feme survives, she by her Fine hath barred her Possibility by Estoppel. *Moor. 557. Wells and Fenton contra. Cro. Eliz. Mesfine Case.*

If Baron and Feme acknowledge their Right to another by Fine and Release, and the Wife only obliges her and her Heirs to Warranty, this is good. *44 Ed. 3. 36. b.*

Warranty.

If Baron and Feme levy a Fine (of Lands whereof they are seised *jure uxoris*) come *ceor*, &c. this shall not be received with Warranty by them and the Heirs of the Husband; but it shall be received by them and the Heirs of the Wife, because it is the Inheritance of the Wife. *44 Ed. 3. 14.*

Release.

Lessee for Life, and after the Reversion is granted by Fine to Baron and Feme, and to the Heirs of their Bodies, the Remainder in Fee to the Baron, and the Baron and Feme by Fine release all their Right to the Lessee, and after they die *sans Issue*, this is a good Enlargement of the Estate of the Lessee, and this shall bar the collateral Heirs of the Baron. *30 Ed. 3. 4. b.*

*Fine enures as
a Release.*

A. Feme Sole, and B. Joint-tenants for Life; A. takes Husband, and A. and her Husband levy a Fine to B. by which A. and her Husband *concedunt* the Land, & *totum*, &c. & *quicquid*, &c. to B. and his Assigns for the Life of A. and this with Warranty, and after B. dies during the Life of A. in this Case he in Reversion may enter, for that this Fine enures as a Release to B. *Trin. 22 Jac. B. R. Eastace and Stawen.* The Lessor may enter into the Whole, and there shall

shall be no Occupant of any Part, because this Fine enures as a Release, not by *Mitter l'estate*, but by Way of Extinguishment.

Baron and Feme by Fine grant Land to *A.* for 99 Years, if he so long live, and they by the Fine warrant the Lands to *A. contra omnes* *Finnes toto termino predicto*; the Baron dies. *Per Curiam*, in *Wotton and Field's Case*: A good Action of Covenant lies against the Wife upon her Warranty in the Fine, although she was Covert Baron; for when the Warranty is only annexed to an Estate for Years, it is only a Covenant for Damages in the personal Lien, which shall bind them, and make them responsible for Damages, as well as where such Warranty is annexed to the Freehold, they shall be bound to warrant the Land, and to answer in Value of their own proper Lands. 2 *Saund.* 180. *Wotton and Hele, Mod. Rep.*

Feme Covert by Warranty in a Fine sur concessit, is bound in an Action of Covenant.

The Husband, after Marriage, assured to the Wife a Jointure, they both levied a Fine *sur Conuissance de droit come ceo que il ad, &c.* of the Gift of the Husband; this is not any Bar to the Wife of her Dower, for the Election is not given to the Wife to claim her Jointure until the Death of the Husband. *Dyer* 358.

What Fine is no Bar to her Election of Dower.

W. and his Wife were seised of Lands to them and the Heirs of *W.* they by Indenture bargain and sell to *P.* in Fee, wherein was a Proviso, That if *W.* or his Wife, or the Heirs of *W.* pay 100 *l.* to *P.* at such a Day, that then it should be lawful for them, and the Heirs of *W.* to enjoy and to re-have and enjoy, &c. and that then (after such Payment) this Indenture, and all other Writs and Assurances to be passed between the said Parties, should be to the Use of *W.* and his Heirs; [leaving out the Wife.] *W.* and his Wife, within seven Years, levy a Fine to *P.* *W.* died, his

Construction.

his Wife paid the 100 l. *Per. Curiam* : The Feine shall have the Estate for her Life ; so is the first Part ; and the other Clause is not repugnant, but may stand together. : *Cro. Eliz.* 744. *Southcoat and Manors.*

The Earl of *Huntingdon*, and the Countess *Elizabeth*, his first Wife, the Mother of the present Earl, join in a Mortgage of her Inheritance for 4500 l. to pay for the Place of Captain of the Band of Pensioners, and subject to the Mortgage, which was for a Term of Years ; the Estate was settled to Countess *Elizabeth* for Life, Remainder to the now Plaintiff, her Son, in Tail ; and the late Earl, in the Mortgage Deed, covenants to pay the Money ; and the Proviso was, That on Payment of the Mortgage Money the Term was to cease ; the Mortgage was several Times assigned, and particularly in 1683, and the Countess joined in it ; and there the Proviso was, That on Payment of the Money by them, or either of them, the Mortgage Term was to be assigned, as they, or either of them should direct or appoint. The Mortgage bore Date *August* 1, 1682. on the 5th of the same *August*, the late Earl, by Letter, thanked the Countess for having sealed the Mortgage ; and added, That the Profits of the Office should be religiously applied to pay off the Incumbrance ; but yet afterwards, when Money came to be paid in, he paid off the Mortgage, but took an Assignment thereof in Trust for himself, and by Will devised his Personal Estate to the Defendant, the Countess, his second Wife, and the Benefit of this Mortgage. The Plaintiff's Bill was, to have the Mortgage assigned to him ; but the Lord Keeper declared he could not decree for the Plaintiff but upon the usual Terms of Redemption, on Payment of

of Principal, Interest, and Costs, discounting Profits; but upon Appeal to the Lords, the Plaintiff obtained a Decree to have the Mortgage assigned to him. *Pasch. 1702. between the Earl and Countess of Huntingdon, 2 Vern. 436, 437.*

Baron seised of Lands in the Right of his Wife, *Exchange.* the Baron and Feme both joined in Exchange with a Stranger for other Lands, which Exchange was executed; the Baron and Feme seised of the Land taken in Exchange aliened the same by Fine; yet the Wife, after the Death of her Husband, may enter into her own Land, notwithstanding that Fine. *1 Leon. 285.*

A. makes an Estate to Friends in Trust to the Use of his Wife, to commence after his Death, the Wife joins in a Fine with her Husband of the Land leased in Trust; this Fine shall dock the Trust, and there being an Extent upon the Land leased, this Trust shall not prevent the Extent by reason of the Fine. *Fine by the Wife docks a Trust.*

A Fine is levied by Baron and Feme, the Feme being within Age; and in Error brought the Fine is reversed for the Nonage of his Wife. The Question was, in *Worsley and Charnock's* Case, If the Fine should be utterly reversed, or should be reversed only as to the Wife, and should stand good against the Husband? And two great Precedents were cited, the one contrary to the other; they who argued that the Fine should be reversed for the Whole, cited *Ely and Ford's* Case, *H. 8.* A Fine was levied between *R. Ely* Plaintiff, and *N. Ford*, and *Jane* his Wife, Defendants, the Wife being within Age; and Judgment was given *Quod finis praedicti annullatur & pro nullo penitus habeatur*, and that the Baron and Feme should be restored; *Baron and Feme levy a Fine, the Feme being within Age, the whole Fine shall be reversed, and not only quoad uxorem.*

and thereupon a Writ issued to the *Custos Bre-
vium* to bring into Court the Foot of the Fine,
and it was presently cancelled in Court. The
other Precedent contrary was 7 *Eliz.* Baron
and Feme levied a Fine, the Husband died, the
Wife being within Age; the Wife took another
Husband, and they brought a Writ of Error;
and the Wife, by Inspection, was adjudg'd with-
in Age, and the Fine was reversed as to her and
her Heirs only. But indeed, in this Case, the
second Husband was a Stranger to the Fine,
and so it might seem absurd to reverse it as to
him; but in the principal Case it was adjudg'd,
that the Fine should be reversed as to both; for
the whole Estate moved from the Wife, and all
passed out of her; and Judgment was given *Quod
Huiusmodi pradiet reversetur*. And by *Gowdy*, we
cannot by this Reversal make the Converse to
have a particular Estate during the Life of the
Wife; *ideo penitus reversetur*. 1 *Leon.* 114.
Worsley and Charnock. 2 *Co.* 77. cited in the
Lord Cromwell's Case.

*Feme Covert
Infant levied a
Fine, in Error
the Court will
not permit the
Husband to
disavow the
Guardian.*

A Feme Covert Infant levied a Fine, and her
Friends got a Writ of Error in her and her Hus-
band's Name, and the Court would not suffer
her Husband to release. But *Hale*; I cannot
see how that can be avoided: But he said, He
had known in such Case, that the Court would
not permit the Husband to disavow the Guar-
dian, which they admitted for his Wife. 1 *Ventr.*
209. 3 *Keb.* 14. in *Marshal and Lady Pretty-
man's* Case.

*Alledged, that
the Feme died
before the
Teste of the
Certificate.*

1 *Mar. Dyet* 89. *b. Verny's* Case: A Fine was
levied by a Feme Covert, who died before Cer-
tificate and Ingrossment; and the Fine after-
wards certified, and alleged Error in *Fait*, that
the Woman died before the *Teste* of the *Dedi-
ments*, whereas the Judge had certified the Con-
cord

cord taken after ; and this was not admitted to be question'd after the Certificate.

Feme Covert levied a Fine within Age ; she was inspected by the Court, and adjudg'd within Age ; whereupon a *Scire facias* was issued to the Ter-tenants, who pleaded she was of full Age at the Time of the Fine levied ; upon which Plea Issue was joined, and a Trial had at the Assizes, and Verdict *pro Quer.* who came into Court, and now prayed Judgment. *Per Glyn* : The Court is to judge of her Infancy, and not the Jury ; and though the Proceedings are not duly had, yet they do no Hurt, and the Fine was reversed. *Style 472. Videan and Fletcher.*

The Court to judge of the Infancy of a Feme Covert, and not the Jury.

If Baron and Feme levy a Fine, and the Co-
pittance is taken six Days before Term, *Pasch. 7 Jac.* and the Writ of Covenant is returnable *quindena Pasch.* which was the third Day of May, and the Husband dies the ninth of May, the King's Silver not being enter'd ; yet if upon Examination it appeareth, that the Clerk had enter'd the King's Silver in Paper before any Exception taken to it, and that now he had enter'd the King's Silver on the Back of the Writ of Covenant, as it ought to be, the Fine shall not be stayed. *Pasch. 7 Jac. B. Boothe's Case* : For when this is enter'd, it shall have Relation to the Writ of Covenant.

Entering the King's Silver.

Farmer and his Wife acknowledg'd a Note of a Fine, 26 March, by *Dedimus potestatem*, and the Wife died the 27th of the same Month ; the 28th Day Composition was made in the Alienation Office on a Writ of Covenant, returnable in *Hillary* Term before ; and the King's Silver was enter'd in the Office of the King's Silver, as of the same *Hillary* Term ; and so the Fine was passed and ingrossed, and in *Easter* Term the

Heir of the Wife moved against this Fine; but the Court resolved the Fine must stand. *Hol*

330. *Farmer's Case.*

Writ of Covenant against Baron and Feme, and in the Summons the Feme was left out, it is Error.

Baron and Feme and a third Person levied a Fine, and the Writ of Covenant was against the Baron and Feme and the third Person, and in the Summons the Feme was left out; for this Error the whole Fine shall be reversed; for being ill in Part, it is ill in all. *Cro. Eliz. 290.*

Baxter and his Wife against Atonating.

What shall be a reasonable Request to levy a Fine.

If Baron and Feme are bound to levy a Fine upon reasonable Request, if Request be made when the Wife is *enseint* or sick, it is not reasonable; and the Request to the Husband alone is not good. *Moor 124.*

If a Baron and Feme levy a Fine of the Wife's Land, to enable them to take up the Sum of 400 *l.* and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in Part of the Mortgage Money, but afterwards borrows as much more of the Mortgagee as he had paid in before; the Mortgagee having the Estate in Law in him by the Forfeiture of the Mortgage, shall hold the Land against the Heir of the Wife until the whole Money is paid; and if the Heir will not pay Principal, Interest, and Costs, he must be fore-closed. *Decreed Pasch. 1682. 1 Vern. 41.*

If the Wife joins with her Husband in a Fine, to raise 400 *l.* by Mortgage of her own Estate, to buy a Place for her Husband, and the Husband dies; this shall be consider'd as a Debt due from the Husband, and shall be paid out of his Personal Estate, if there be enough to pay all his other Debts. *Mich. 1714. between Tarr and Austin, 2 Vern. 689.*

Of Commissioners taking a Fine of a Feme Covert.

Herbert Parrot's Case: A Feme Covert (his Wife) at twenty Years of Age levied a Fine before Commissioners in the Country, and the Wife dies *sans Issue*; she had settled the Estate upon her and her Husband, and the Heirs of their two Bodies. The Court was moved to set it aside, but they agreed they could not meddle with it; but if the Wife had been alive, and under Age, they might bring her in by *Habeas Corpus*, and inspect her, and set aside the Fine upon Motion; for perhaps the Husband would not suffer the bringing of, or proceeding in a Writ of Error. And the Commissioners in this case were not fined, because they could not discern by the View whether she was of Age, she being twenty Years old: But had it been apparent by Inspection, that she was within Age, then they ought to have been fined. 2 *Ventr.* 30. *Mod. Rep.* 246. But in *Cavendish's Case*, *Roll. Rep.* 113. the Commissioners did perfectly know that the Feme Covert, who levied a Fine, was within Age; and for this Cause two of them were fined, but the Fine stood, and not reversed.

Carrel's Case, in *Dyer* 229. *b.* and 12 *Co.* 142. A Feme Covert of nineteen Years of Age acknowledged a Fine before Commissioners, several Judges being in Town, who might have examined her: She died on *Friday Easter Week*, the Fine and King's Silver was enter'd as *Hilary Term*, four Days before the Wife's death. The original Writ of Covenant bore the 15 *Jan. Ret' Craft. Pur.* and the *Dedimus Potestatem* 18 *Jan.* *Dyer* saith, This Fine stopped the Ingrossing, for undue Means

in gaining it; but in 11 Co. the Fine adjudged good.

Where a Feme Covert shall be examin'd or not.

A Feme Covert is not to be examined upon any Fine, but when she and her Husband pass some Estate or Interest, or make a Grant and Render to another, or release her Right by a Fine of Lands or Tenements. 1 *Inst.* 353.

The Examination of a Feme Covert ought to be secret; and the Effect is to examine her whether she be content to levy a Fine of such Lands, naming them particularly and distinctly, and the Estate that passeth by the Fine of her own voluntary free Will, not by Threats, Menaces, or any compulsory Means; but where nothing is moved in the Fine, but only that the Husband and Wife do take an Estate by the Fine, this shall not conclude the Wife, because in such Case she shall not be examined.

Against a Fine levied by herself; a Woman cannot be remitted, because she was thereupon examined.

If a Fine be levied of Land to Baron and Feme, and the Baron and Feme grant and render the Land, there the Wife shall be examined, and the Examination must ever be upon the Writ; and therefore a Baron and Feme upon a Fine levied to them of Land, cannot grant and render out of the Land, because the Rent is not contained in the Writ. 2 *Inst.* 515.

8 *H.* 4. 8. *b.* If a Fine *sur Grant & Render* be made to Baron and Feme, she shall not be examined; this is to be understood as the principal Case there, that there was not any Conu-
sance by Baron and Feme, but only a Grant and Render by the other.

If

If a Fine *sur Conusance de droit* be levied to Baron and Feme, rendring Rent, the Feme shall be examined, because she is to be charged with the Rent. 46 Ed. 3. 15. b.

If a Fine upon Release be levied to Baron and Feme, she shall not be examin'd, because the Fine is not an Estoppel, but for her Advantage. H. 6. 42. So if a Fine *sur Conusance de droit* be levied to Baron and Feme, this shall not estop the Wife to claim another Estate.

Now a Fine which passeth an Estate ought not to be received, if she be not examin'd; but if the Fine be received and recorded, the Feme Covert, or her Heirs, shall not be received to aver that she was not examined nor assented; for this should be against the Record of the Court, and tend to weaken the general Assurances of the Realm. 2 Inst. 515.

Where a Feme Covert shall be barred by Fine and Non-claim.

Fine and Non-claim of the Wife's Land shall bar the Husband, who suffer'd five Years to pass, and all claiming under him, and the Wife herself during the Coverture; but the Wife shall have a new five Years after the Death of the Husband. Cro. Car. 200. *Holme and Heyfield's Case.* 4 H. 7. cap. 24.

Tenant for Life, the Remainder in Fee to a Feme Covert; the Tenant for Life levies a Fine, the Husband dies; the Wife takes another Husband, the Tenant dies, the five Years pass, the Husband dies, the Wife is barred, and is not remedied by the Statute of 32 H. 8. 28. *Dyer* 159. *in Margine.* And this Neglect of the second Husband shall be prejudicial to the Wife. *Whetstone and Wentworth.*

A Man seised of Lands in Fee taketh a Wife, and after levies a Fine, and the Proclamations were made, and the five Years pass in his Life, and he dies, and after his Death other five Years pass, and after the Wife brought her Writ of Dower; she shall be barred, because the Wife had Title by the Intermarriage, although it cannot be executed till after the Death of the Husband; and because she had Title at the Time of the Fine levied, she shall be bound by Non-claim for five Years after her Title consummate. *Moor* 53.

Declaration of Uses.

Beckwith's Case settles this in these Resolutions. 2 Co.

If the Husband alone declare the Use of the Fine levied by them both of the Wife's Land; his Declaration shall bind the Wife, if her Dissent doth not appear. Neither is it always necessary that the Name of the Wife should be set to the Indenture, which doth declare the Use.

The Wife hath Estate in the Land, and is not *sui juris*, the Husband is *sui juris*; but he had no Estate in the Land, and therefore they differ in the Limitation of the Uses: All is void.

If the Husband and Wife sell the Land of the Wife for Money by Parol, and after levy a Fine to the Vendee, this shall bind the Wife without other Writing, proving her Assent.

If Baron and Feme levy a Fine of the Wife's Land, and an Indenture is written in the Name of the Baron and Feme, whereby the Land is limited to certain Uses, and the Husband only seal and deliver it, and the Wife will not, but disagrees to it; this Limitation of the Baron shall

shall not bind the Wife, although the Wife had not expressed her Disagreement by any Deed or Limitation of other Uses. *Mitch. 15 Jac. B. R. Webb and Worfield.*

This Case in Effect was as followeth: *Hus-* S. C. 4 Mod.
band and Wife were seised in Fee of Lands in 261.
Right of the Wife, and by Indenture made be- 2 Salk 677.
tween them and others, bearing Date the 29th
of *January*, it was recited, that a Fine was
intended to be levied by the Husband and Wife
of these Lands, by which Indenture they co-
venanted to levy the said Fine as of the next
Hillary Term, and then the Uses were de-
clared, to which the said Fine should enure
after it was so levied, *To the Husband and Wife*
and the Heirs of the Husband.

Two Days afterwards, there was another
Indenture executed, to which Indenture the
Husband and Wife only were Parties, by which
it was agreed and covenanted between them,
to the Effect following: That all former Con-
tracts, Covenants, and Agreements made be-
tween them should be suspended, and take no
Effect, until the Husband should settle such a
Manor upon his Wife for Life, as an Addition
to her Jointure.

Afterwards the Fine was levied accordingly,
in the very same *Hillary Term*, in which both
the Indentures did bear Date.

The Husband did not convey his Manor ac-
cording to the last Indenture, but died without
Issue; and now the Question was (after the
Death of the Wife) who should have her
Lands, (*viz.*) whether the Heir of the Hus-
band, or the Heir of the Wife, who was Lessor
of the Plaintiff.

The

The Plaintiff had Judgment, and upon a Writ of Error brought in the House of Lords, that Judgment was affirmed. *Carthew* 100, &c.

If a Man marries a Woman, who has a Jointure in some Houses which are burnt down, and they on a Fine levied by them of the Houses borrow 1500 *l.* to rebuild them, and by Deed between the Husband and Conusee only the Equity of Redemption is reserved to the Husband and his Heirs, and he lays out 3000 *l.* in Building; the Wife (she being no Party to the Deed, by which the Redemption was reserved to the Husband) shall redeem, and not the Heir of the Husband. Decreed by *Nottingham* Lord Chancellor, and affirmed by *North* Lord Keeper, *Hill.* 35 *Car.* 2. 1 *Vern.* 213.

Of a Fine levied to Baron and Feme, and the Operation. Vide supra Tit. Examination of Feme Covert.

Feme Covert is Tenant for Life, the Remainder in Fee to the Son, which she shall have, and he in Reversion before the Birth of the Son bargains and sells the Land, and levies a Fine of it to the Baron and Feme; the Particular Estate of the Wife is drowned in the Reversion, and the contingent Remainder is destroyed. 2 *Saund.* 386, 387, 388.

Recovery.

Common Recovery against Tenant in Tail and his Wife having nothing shall bind the In-tail. *Plowd.* 540. *Ear* and *Snow.* *Hob.* 27. And a Voucher may be by the Baron only upon a Release

lease with Warranty to him and his Wife, if the Wife have nothing. *Hob. 27.*

Tenant for Life, the Remainder to Baron and Feme and their Heirs, the Baron and Feme suffer a Recovery: The Question was, If the Heirs of the Wife are bound by this Recovery, because the Feme being Covert, it was conceived she was not Tenant to the *Præcipe*, because it appears not she was examined? *Per Curiam*: It is held *Br. Abr. Recovery in Value 27.*

A Feme Covert is barred by a Common Recovery, and it is the common Practice. *10 Co. 43.*

And it is not necessary to examine a Feme Covert upon a Recovery, tho' it be prudential to do it; tho' in a Fine it is otherwise, because there is no Recompence in Value; and the Feme here is Tenant to the *Præcipe*, and she shall be estopped to speak against the Recovery, for she joins in the Recovery with her Husband, and here is no Default made by the Baron; and now the Record is perfect, and a Thing contrary to it is not to be averred against it; but before the Record was perfect she might have pleaded; and the Recompence in Value here shall go to the Heirs of the Wife, and the Tenant for Life is also bound by this Recovery, and the Feme is privy to the Recovery. If a Stranger had been Tenant to the *Præcipe*, and the Baron and Feme had been vouched, the Feme had been bound, and this is a stronger Case. *Stil. 319. Locker and Palsfryman.* But it was the Opinion of Chief Justice *Bridgman* in *B.C. Sid. 11.* That a Feme Covert ought to be privately examined in a Common Recovery, but said, the Practice was otherwise; but it was a Fault and ought to be corrected; yet the Recovery passed without Examination: And so is my Lord *Coke's* Opinion, *10 Co. 45.* in *Per-*

Feme Covert is barred by a Common Recovery.

It is prudential to examine a Feme Covert upon a Recovery, but not necessary, and why.

tington's

tington's Case, That the Wife had used to be examined upon a Recovery, and a *Dedimus Po-testatem* granted to take her Examination upon the Conusance.

The Baron only
is vouched.
Quid Opera-
tur.

Baron and Feme seised to them and the Heirs Male of the Body of the Baron, the Remainder in Tail to B. the Reversion to the right Heirs of the Baron; the Baron levies a Fine; the Conusee suffers a Recovery, and voucheth the Baron, who voucheth the common Vouchee: *Per Curiam*; This Recovery shall bind the Tail, because he comes in in Privy of the Tail, 3 Co. 6. *Cupledike's Case*. The Wife, who had an Estate for Life with her Husband, was not vouched; and though the Estate of the Wife is not recontinued, yet the Husband, as Voucher, shall be in Judgment of Law in Privy of the Estate-tail which he once had; and the Estate of the Wife by the Husband's Fine is put to a Right, so as the Husband comes in as sole Tenant in Tail: *Aliter* if the Baron and Feme are seised to them and the Heirs of their two Bodies with Remainders over. But

An Estate is made to Baron and Feme, and to the Heirs of the Body of the Husband, a Common Recovery is had against the Baron, who voucheth the common Vouchee; the Baron survives his Wife, and dies without Issue; this is not good to bar the Remainders, because at the Time of the Recovery there were no Moieties between him and his Wife; and the Baron had not Power to sever the Jointure, and he, during the Life of his Wife; is not seised by Force of the Tail, so that the *Pracipe* being brought against him only, the Conveyance cannot for any Part enure to the Estate-tail, or to the Remainder; to all the Estate it cannot enure, because the Wife had a joint Estate with him

him, who was no Party to the Recovery; and for a Moiety it cannot be good, for there are no Moieties between Baron and Feme. 3 Co. 5. *Owen and Morgan's Case.*

If Baron seised in the Right of his Wife for Bargainee's Life, the Remainder in Tail to B. the Remainder to C. and the Husband bargains and sells the Land to another, against whom a *Præcipe* is brought, who voucheth him in Remainder, and so a Common Recovery passeth; this shall bind the Remainder, although not the Wife, because the Bargainee was a good Tenant to the *Præcipe*. 2 Rol. Abr. 394.

Where Baron and Feme are vouched, it shall be intended to be in the Right of his Wife. 20 H. 7. 1. b. And therefore in *Grosvenor and Massye's Case*. 1 Leon. 291. n. 318. Four Husbands and their Wives are vouched in Recovery, and the Plaintiff brought his Writ of Error as Heir to one of the Husbands; he ought to have brought it as Heir to one of the Wives.

In Consideration of Marriage the Father enfeoffs his Son and a Feme sole in Fee-simple, who intermarry, this is not within the Statute; 11 H. 7. They after grant the Land by Fine to the Father, who renders to them in Special Tail; this is a Conveyance of each one for his Moiety to the Father, which Moieties they take divided by the Gift before Marriage, and then the Render of all to them in Special Tail; as to the Moiety of the Son, which he had by the Fine, the Gift of the Father to the Son and his Wife is within the Statute of 11 H. 7. But as to the Moiety, which the Wife gives by the Fine, and which the Father renders in Special Tail, this was not within the Statute. The Baron and Feme suffer a Recovery as Vouches; this

Baron and Feme suffer a Recovery as Vouches, if it be a Forfeiture.

this is a Forfeiture within the Statute of 11 H. 7. Moor 715. *The Queen and Savage.*

The Wife in a Common Recovery, being within Age, ought to appear by Guardian.

If a Common Recovery be suffered, and the Baron and Feme as in Right of the Wife (the Feme being within Age) are vouched, and they appear by Attorney and vouch over, and so a Common Recovery is had, this is Error; for though her Husband be of full Age, yet the Wife being within Age, she ought to appear by Guardian. *Hill. 17. Jac. B. R. Holland and Lee.* But saith Rolles, 1. Abr. 288. *dubitatur.* *Dyer* 290. 366. But no Doubt is in the Case; for the Appearance by a Feme Covert, in a Recovery, within Age, by an Attorney, is Error; and though it may be objected, that the Husband is of full Age, and therefore he may make Attorney for himself and his Wife, the Law is not so; for the Rule is, that the Husband cannot give away or lose the Inheritance of the Wife; but it must be given or lost by her self or her own Act, and she ought to appear by Guardian notwithstanding the full Age of the Husband, who is to be joined for Conformity with her. *Sid. 322. Ray and Robinson.*

The Custom of London.

Dyer 290, 363. A Recovery suffered by Baron and Feme of the Land of the Wife is as strong to bind the Right of the Feme Covert by the Custom of London, as a Fine at Common Law, *Vide* there such Custom as to Wales,

or 15

Recovery by Default.

If the Baron lose by Default the Fee-simple Lands of the Wife, the Wife had no Remedy but by a Writ of Right; but by the Statute of *H. 2. cap. 3.* she shall have a *Cui in vita.*

If

If a Recovery be had against Baron and Feme, Tenants for Life by Default, they may have a *Quod ei de forceat*. 2 Inst. 350. by Stat. W. 2. c. 4. and after his Death she may have a *Quod ei de forceat*.

CHAP. XIV.

Attornment.

What Act of the Husband or Wife shall amount to an Attornment. Aveury for Rent out of Wife's Land, in whose Name it ought to be. Where and to what Purposes a Feme Covert shall be said a Disseisees without her proper Act or Entry, and where, and to what not. What Act of the Husband shall be a Discontinuance of the Land of the Wife, and what not. What was a Discontinuance at the Common Law. Where a Descent cast during the Coverture shall toll the Entry of the Wife or not.

I Have considered what Alterations have been made by Intermarriage, as to Estates, Leases, Chattles, Actions and what Things of the Wife accrue to the Husband by the Intermarriage, and what Charges, Acts or Forfeitures made by the Husband bind the Wife or not after his Death. The next Reflections shall be briefly of such Titles as concern real Actions or Estates, as Attornment, Disseisin, Remitter and the like.

If a Feme grant a Reversion to a Man in Fee, and marry the Grantee, the Lessee attorns to

to the Husband; this is a good Attornment in Law to the Husband. 1 *Inst.* 320.

If a Feme sole make a Lease for Life or Years, reserving Rent, and granteth the Reversion in Fee, and taketh Husband, this is a Countermand of the Attornment. 1 *Inst.* 310. *b.*

If there be Lord and Tenant, and the Tenant taketh a Wife, and after the Lord grants the Service to the Wife and her Heirs, and the Husband accepteth the Deed, in this Case after the Death of the Husband, the Wife and her Heirs shall have the Services, &c. for by Acceptance of the Deed by the Husband, this is a good Attornment, &c. albeit during the Coverture the Services shall be put in Suspence. *Lit.* 559.

A Feme Covert is compellable to attorn. 1 *Roll. Abr.* 296.

If the Husband accept the Grant of a Reversion, this shall amount to an Attornment. 10 *Co.* 42. *Lampet's Case.*

A Feme may be Attorney to deliver Seisin to her Husband, and the Husband to the Wife. 1 *Inst.* 52. By 4 *Ann. ch.* 16. Attornment is rendered unnecessary in most Cases. See the *Act.*

Avowry. Vide Rent.

If the Husband be seised of a Seigniorie in the Right of his Wife, Conusance ought not to be made of Rent as Bailiff to the Husband alone, but as Bailiff to them both. 12 *R.* 2. *Avowry* 88. *Contra* 14 *H.* 4 *Avowry* 198.

Avowry to be made in the Name of Baron and Feme.

If Lessee for Years be, rendring Rent, and the Reversion descend upon a Feme Covert, and after the Rent is arrear, and the Baron distrains, and the Lessee brought Replevin, the Husband

Husband ought to avow in the Name of himself and his Wife, and not in the Name of himself alone; for the Avowry is to be made according to the Reversion, which is in the Wife.
1 Roll. Abr. 318. *Wife and Bennet.*

*In Replevin, Def. ut Ballivus H. & A. uxoris
ejus cognovit, &c. Quod ante, &c. Willielmus
& fuit seifitus de septem acris pasturæ cum pertin.
in D. unde locus est parcella in dominico suo ut
de feodo & tenuit de præd. H. & A. ut de Ma-
nerio suo de D. in Com. præd. per fidelitatem &
reddit. 3 d. ad Festum, &c. Nec non per servi-
tium fact. seet. ad Curiam, &c. de quo qui-
dem Manerio quidam R. W. fuit seifitus in feodo,
& sic seifitus per nomen, &c. per quoddam scrip-
tum suum indentat. geren. dat. tali die & anno
foffavit quendam R. S. & præd' A. tunc uxorem
ejus de eodem Manerio habend. & tenend. pro
termino vitæ naturalis ipsius A. ad quod quidem
foffamentum præd. tenens postea & ante, &c.
apud D. præd. se iisdem R. S. & A. attornavit
Quorum prætextu idem R. & A. fuer. seifiti de
Manerio præd. cum pertin. in dominico suo, &c.
pro termino vitæ ipsius A. Ipsisque sic seifit. præd.
& obiit ac prædicta A. ipsum supervixit, & se
tenuit intus ac fuit inde sola seifita in dominico
ut de libero tenemento pro termino vitæ suæ. Et
sic seifit. percepit virum præd. H. per quod, &c.
de quibus servitiis fuer' seifit. per manus & in
jure ipsius A. & sic cognovit pro redditu. Ex
Manuscript. Mri. Brownloe, Trin 19 Eliz. Rot.
543.*

Where and to what Purposes a Feme Covert shall be said a Disseisress, without her proper Act or Entry, and where and to what not.

It is regular
a Disseisress
curement pre-
greement sub-
or proper Act
if she be of C-
band to a Dis-
sequently shall

But it is u-
shall not be
Husband; as i-
the Use of th-
fore by this
she agree durin-
ment is void
Disseisress, u-

If after the Death of the Husband she agree to the Disseisin, she shall be a Disseisress.

If Baron and Feme enter into Land in the Right of the Wife, where she had no Right, the Feme is no Disseisress for it shall be taken to be the Act of the Husband only.

Feme Covert cannot make a Disseisin to the Use of the Husband.

A Feme Covert cannot make a Disseisin to the Use of her Husband. 8 H. 6. 14. b. Curia. For although she gain an Estate by her Entry yet she had not Power to dispose of it to another, being Covert; as she ought, if she make a Disseisin to the Use of another; but contra 21 H. 7. 35. So a Feme Covert cannot disseise a Man to the Use of a Stranger.

If a Man take a Distress for Rent issuing out of the Land of a Feme Covert, and the Baron

and

and Feme make Rescous, they both are Disseisors. 21 E. 4. 53.

If the Husband discontinue the Land of his Wife, the Wife being in Possession and disagreeing to the Person claiming her first Estate, she is a Disseisor.

Note; If the Husband disseised one to the Use of his Wife, no Agreement of the Wife shall be laid to the Disseisin, for that she cannot disagree during Coverture. Ex Manuscript. Mri. Brownloe.

Note; In Trespass ad novam assignationem Def. placitat liberam Tenementum ipsius Def. & E. uxoris ejus in jure, &c. Ad quod Quer. dicit quod ipse fuit seiscus quousque disseisit per te Baron ad usum uxoris per quod fuor seiscus per disseisinam, & quod disseisee re-entet & Tresp' null' faciend' mentionem de agreement del feme ad disseisinam. Quare, car aliter d'estringio; Def. maintain son Freehold & Traverse le disseisin. Ex Manuscript. Mri Brownloe.

Discontinuance.

Where and what Act by the Husband was a Discontinuance of the Land of the Wife at the Common Law, and what shall be a Discontinuance, and what not.

If a Man be seised of Lands in the Right of the Wife in Fee, Tail or for Life, and thereof enfeof another, and dieth, the Wife may not enter, but must enter her Action, which is called a *Cui in vita*, or a *Sur. cui in vita*, for the Heir; this was at Common Law before the Statute of 32 H. 8. c. 38.

But now by that Statute the Wife and her Heir after the Death of her Husband may enter

Stat. 32. H. 8. cap. 28.

In what Cases the Wife may enter after the Discontinuance of the Action.

ter in the Lands or Tenements of his Wife, notwithstanding the Alienation of the Husband.

So it is where the Husband and Wife are jointly seised to them and their Heirs of an Estate made during the Coverture, and the Husband makes a Feoffment in Fee and dieth, the Wife may now enter by that Statute, although it was the Inheritance of them both. So it is if the Feoffment be made by the Baron and Feme (albeit the Words of the Statute be by the Baron only) for in Substance this is the Act of the Husband only. If Lands be given to Baron and Feme, and the Heirs of their two Bodies, and the Husband makes a Feoffment in Fee, and dies, the Wife is holpen by the said Statute.

Stat. 32 H. 8. helps the Discontinuance, but not the Bar.

But note ; If the Husband levy a Fine with Proclamations, and dies, the Wife must enter or avoid the Estate of the Conusee within five Years, or else she is barred for ever by the Statute of 4 H. 7. For the Statute of 32 H. 8. doth help the Discontinuance, but not the Bar ; and the Statute speaketh of a Fine, but not of a Fine with Proclamations. 1 Inst. 326.

Note ; Of Things that lie in Grant, as Rents, Commons, &c. there can be no Discontinuance.

J. B. and Jane his Wife, being seised of Land to them and the Heirs of the Body of J. B. the Remainder to Ed. B. and the Heirs of his Body, the Remainder to W. B. in Tail, the Remainder to G. Edwards in Tail, the Remainder to the Right Heirs of J. B. J. B. and his Wife, and W. B. the third in Remainder, joined in a Feoffment with Warranty to M. K. and after the said Baron and Feme levied a Fine to M. K. 1. Whether the Feoffment be a Discontinuance

What is a Discontinuance.

continuance of the Estate-tail? *Per Curiam*: It is a Discontinuance, and the joining of *William* does not hinder a Discontinuance, because there is an intermediate Estate-tail in *Edward*, which is discontinued. 2. This Feoffment and Fine to the same Person make but one Assurance; and when the Wife is barred and her Estate destroyed by the Fine that she cannot enter, those in Remainder cannot enter, but are as at Common Law. *Cro. Car. 321. King and Edwards.* *As to the Remainder.*

If a Woman Inheritrix, who hath a Husband within Age, and he being within Age, makes a Feoffment in Fee and dies, she may enter, and she shall take Benefit of the Nonage of the Husband; for the Heir of the Husband cannot enter, for no Right or Title descends to him. *The Wife may enter after her Husband dies in Nonage.*

A Baron seised of Land in the Right of his Wife makes a Feoffment in Fee upon Condition, and dies; if the Heir enter upon the Feoffee, for the Condition broken (as he may;) for though no Right descended to the Heir, yet the Title of Entry by Force of the Condition descends to him: The Entry of the Wife is congeable upon the Heir, for by his Entry he hath avoided the Feoffment, and so defeated the Discontinuance, and his Estate vanisheth, and the Estate vesteth in the Wife without Entry or Claim. *Discontinuance being defeated by the Entry of the Heir for Condition broken.*

If Baron and Feme make a Lease for Life by Deed of Lands of the Wife, if the Feme, after the Death of the Baron, agrees, it is no Discontinuance; but if she disagree, it is a Discontinuance. *Cro. Car. 406.* *Discontinuance or not by the Agreement of the Wife.*

If a Man seised in the Right of his Wife, letteth the same Land to another for Term of his Life, now the Husband hath again the Reversion of the Fee-simple; if the Husband dies, living

What is not a Discontinuance

ving the Wife and the Tenant for Life, and the Reversion descend to the Heir of the Baron, and he grant the Reversion to another in Fee, and the Tenant attorns, and then the Tenant for Life dies, and the Grantee of the Reversion enters, this is no Discontinuance to the Wife, but she may well enter upon the Grantee, because the Grantor had nothing at the Time of the Grant in the Right of the Wife, when he made the Grant of the Reversion. *Lit. Sect.* 639. But if the Baron and Feme in such Case join in a Lease by Deed, the Reversion is not discontinued, but remains in the Wife, and yet it was at Common Law a Discontinuance for Life.

What is a Discontinuance, and of the Husband's being seised by Force of the Tail.

If Baron and Feme, Tenants in special Tail, and the Husband aliens in Fee, this is a Discontinuance of the Tail, for he is seised of all intirely. 8 Co. 71. *Greenloe's Case*.

But if the Husband be seised of Land in the Right of the Wife in Tail, and alien in Fee, this is not any Discontinuance of the Tail, for he is not seised by Force of the Entail. 1 *Inst.* 326.

Pleade

If Lands are given to Baron and Feme, and to the Heirs of the Body of the Baron, and the Husband makes a Feoffment in Fee, this is a Discontinuance; for the Husband is seised by Force of the Tail, and so it shall be pleaded, 9 *Car. B. R. King and Edwards*.

If Tenant for Life be, the Remainder in Tail, and he in the Remainder enter upon the Lessee, and disseiseth him, and makes a Feoffment over, this is not any Discontinuance, because he is not seised by Force of the Tail. *Trin 2 Jac. B. R. Morlidge and White*.

But if the Lessee for Years be, the Remainder in Tail to J. S. and J. S. enter upon the Lessee

Lessee and makes a Lease for Life, or Feoffment in Fee, this is a Discontinuance, for he was seised by Force of the Tail, at the Time of the Feoffment. *Pasch. 11 Jac. B. R. Sir Kenelm Digby and Jordan.*

If Baron seised of a Copyhold in the Right of the Wife will surrender it to the Use of another in Fee, who is admitted accordingly, this is not any Discontinuance to the Wife. *4 Co. 23. Bullock and Dibley.*

The Husband discontinues, and the Wife is attainted, the King shall have the Right of the Entry. *Hob. 241, 243.*

Descents.

Where a Descent cast during the Couverture shall toll the Entry of the Feme, and where not.

If a Feme sole be seised of Lands in Fee, and is disseised, and then taketh Husband, in this Case the Baron and Feme, as in Right of the Feme, have Right to enter, and yet the dying seised of the Disseisor in that Case shall take away the Entry of the Wife after the Death of the Husband, because when she was sole, she might have entred and recontinued the Possession; and it shall be accounted her Folly, that she would take such an Husband which would not enter before the Descent: But there if the Woman were within Age at the Time of her taking Husband, then the dying seised shall not after the Death of the Baron take away her Entry, because no Folly can be accounted in her, she being within Age when she took Husband, and after Couverture she cannot enter without her Husband.

Where a Descent cast during the Couverture shall toll the Entry of the Wife, and where not.

And if the Baron and Feme *in Droit* of the Wife have Right and Title to enter into Lands which another hath in Fee or Tail, and such Tenant dies seised, the Entry of the Husband is taken away upon the Heir, which is in by Descent: But if the Husband die, the Wife may well enter upon the Heir, for that no Laches of the Husband shall turn to the Prejudice of the Wife or her Heirs, 1 *Inst.* 246. *a. b.* and so 9 *H.* 7. 24. Disseisee goes beyond Sea, or marries, where a Descent is cast during the Coverture or Absence, this shall bind, because it was a Default to go or marry when he was disseised.

Where Entry of Disseisee is congeable upon the Wife of the Disseisor after Endowment, notwithstanding the Descent.

If a Disseisor die seised, and his Heir enter, who endows the Wife of the Disseisor of a third Part of the Land, as to the Part assigned in Dower presently after the Wife entreteth thereunto, the Disseisee may lawfully enter upon the Possession of the Wife into the said Part, because when the Wife hath her Dower, she shall be adjudged in immediately by the Husband, and not by the Heir; and as to that the Descent is defeated, and she is in by a Title paramount the Descent and dying seised. 1 *Inst.* 240, 241.

C H A P. XV.

Remitter.

The Nature and Reason of Remitter. What Act shall be a Remitter to the Wife. Remitter wrought by a voidable Estate. Remainder expectant on an Estate for Life works no Remitter. Notwithstanding what Acts and Aliensations by the Husband the Wife shall be remitted. Of Remitter by Acceptance. Where the Wife being remitted during the Coverture may, after the Death of her Husband, waive the Remitter, and where not. No Disagreement of the Husband shall devest the Remitter, and the Reason. Where a Warranty descending on an Infant, or a Feme Covert, shall be a Bar, and where not. Where the Baron and Feme shall be Joint-tenants; and where by Intireties, and where by Moieties, with several Cases to illustrate that curious Learning; and how it was at Common Law, and how it is now by the Statute of Uses.

BARON and Feme Tenants in special Tail, with Remainder over, the Baron discontinues by Fine or Feoffment, and then takes an Estate back to himself and his Wife in special Tail, by this the Wife is *ipso facto* remitted. *Where the Wife is remitted.*

Tenant in Tail before the Statute of 27 H. 8. made a Feoffment in Fee to the Use of his Wife for Life, and after to his Son and Heir in Fee; then the Statute is made, and the Baron and Feme are dead, the Issue shall not be remitted, and this for the Violence of the Letter of 27 H. 8. So if a Feme have Right of Lands discontinued, where his Entry was not *Explication of the Statutes of 27 H. 8. and law- 32 H. 8.*

lawful, if she come to that Land by way of an Use raised out of that Estate, she shall not be remitted, for she must be in of the Estate, as she was of the Use; but now by the Statute of 32 H. 8. it hath changed the Reason of this Case, which hath given the Wife Entry against her Husband's Fine; so that now by the Use raised to her out of such Estate, she is not in of an Estate discontinued, but of an Estate whereupon, after the Death of her Husband, she might have re-enter'd. Now as upon Re-entry, in such Case where the Entry is lawful, she is remitted; so where an Estate is convey'd to her, and is in her, though by the Statute her Entry being lawful, she shall be adjudged in of her best Estate, her Remitter being *Inratio legitima*, though not *actualis*. *Hob. 255, 256.*

Where the Baron discontinues and retakes to himself and Wife, the Wife is remitted.

A Woman seised of Land in Fee taketh Husband, who aliens the same Land to another in Fee, the Alienee lets the same Land to the Baron and Feme for Term of their Lives, she is remitted, though it be by Deed indented; and though there are no Moieties between Baron and Feme, yet this is a Remitter presently: So Estate granted by Intermarriage may be sufficient Estate to gain a Remitter, as well as an Estate made to Baron and Feme shall work a Remitter; and she is remitted in the Life of Discontinuor, because she hath a present Right; but not so of the Issue in Tail.

Issue in Tail, of full Age, takes Husband, a Lease to her and her Husband by the Discontinuance shall be a Remitter.

Tenant in Tail discontinues the Tail, and hath Issue a Daughter, and dies, the Daughter being of full Age taketh Baron, and the Discontinuee makes a Release of this to Baron and Feme for their Lives; this is a Remitter to the Wife, and the Wife is in by Force of the Tail. *Litt. Sect. 671.*

A Woman seised of Land in Fee takes Husband, who aliens the same Land to another in Fee, (and though it be by Fine) yet that shall not hinder the Remitter; because a Feme Covert is not to be examin'd upon any Fine, but when she and her Husband pass some Estate or Interest, or release her Right by a Fine of Lands or Tenements; and therefore if the Husband levy a Fine of the Wife's Land, and the Conusee grant and render the Land to the Husband and Wife, although the Wife be not Party to the Original, nor to the Conusance, and therefore cannot take any present Estate, but by Remainder only; yet it works a Remitter, and the Grant and Render is not void, but voidable only by Error. 1 Inst. 353.

Where, upon a Discontinuance by the Baron by Fine, a Grant and Render to the Wife shall be a Remitter to her. Remitter wrought by a voidable Estate.

If the Baron discontinues the Land of his Wife, and after takes back an Estate to him and his Wife, and to a third Person, for their Lives, or in Fee, this is only a Remitter to the Wife for a Moiety; and for the other, she must have a *Cui in vita*, and his Disagreement shall not develt her of Remitter. 1 Inst. 356.

Remitter for a Moiety.

Land is given to Baron and Feme in special Tail, the Baron aliens the Land in Fee, and takes back an Estate to him and his Wife for Term of their Lives; this is a Remitter to the Baron and Feme maugre the Husband, for they are one Person in Law; and it cannot be a Remitter to the Wife, unless it be a Remitter to the Baron.

Remitter to Husband and Wife maugre the Husband.

The Baron discontinues the Land of his Wife, and the Discontinuee is disseised, and after the Disseisor lets the same Lands to Husband and Wife for Term of Life; this is a Remitter to the Wife, except she were covinous to the Disseisor: If such Discontinuee make an Estate of Freehold to the Husband and Wife by Deed

Deed indented on Condition, rendring Rent, and for Default of Payment, a Re-entry; and because the Rent is behind, the Discontinuee enters, then for this Entry the Wife shall have an Assize of *Novel Disseisin*, after the Death of the Baron, against the Discontinuee, because the Condition is defeated; yet the Husband, with his Wife, cannot have an Assize, because the Baron is estopped. *Litt. Sect. 769.*

Remainder expectant on Estate for Life worketh no Remitter.

And if the Baron discontinue the Tenements of his Wife, and takes back an Estate to him for Life, the Remainder to his Wife for Life; this is no Remitter to her till after his Decease, because during his Life she hath nothing in the Freehold. *Sect. 680.*

Heir remitted by the Entry of the Feme.

Baron and Feme, Tenants in special Tail upon Purchase of the Baron, they have Issue two Sons: The Husband makes a Feoffment to the Use of himself for Life, the Remainder to the Wife for her Life, the Remainder to the second Son and his Heirs; the Baron dies, the Feme enters and makes a Feoffment to the Issue of the second Son, and the eldest enters for the Forfeiture within the Statute of 11 H. 7. His Entry is congeable, and this Feoffment by the Wife (though it be to him who had the Reversion in Fee) is a Forfeiture within the Statute; for, by the Entry of his Wife, he was remitted. *Sid. 93. Jones and Philpot.*

Remainders remitted.

If Baron and Feme are Tenants in special Tail, and the Baron only levies a Fine to the Use of himself and his Wife for Life, though the Intail be barred as to the Baron and the Issues, yet the Wife is remitted to the Estate-Tail, as she should have been by an Entry after her Husband's Death, and the Remainders, which were depending upon that Estate-tail, are

are likewise remitted: *Hob. 257, 259. Duncomb and Wingfield.*

If a Man seised in the Right of his Wife makes a Lease for Life, the Remainder over in Fee, and after he and his Wife recover the same Land, by a Writ of Entry in the *Post*, against the Lessee for Life. *Per Dyer*: The Wife shall be remitted, as well as where a Recovery is made to Baron and Feme, for the Recovery counter-vails a Feoffment. *Quære*, If she shall not be estopped by the Record? *Maor 32.*

Wife remitted upon a Writ of Entry in the Post.

The Baron discontinues the Land of his Feme in Fee, to the Use of him and his Wife for Life, with Remainder over, and dies; the Wife enters, but was not remitted, notwithstanding that the Possession was transferred to her Use by the Statute of Uses; because the Statute saith, he shall have Possession in such Manner as he had the Use; and as the Use makes no Remitter, so neither the Possession transferred to it. *Plowd. Amy Townsend.*

Where the Use makes no Remitter.

Remitter by Acceptance.

Trin. 15 Jac. Rot. 988. Duncomb's Case. Baron levies a Fine of the Land of his Wife, and dies; the Wife accepts a Lease for Years of the same Land, and resolv'd it was a Remitter. *Dyer 171. in Margine.*

*Where the Wife, being remitted during the Cover-
ture, may, after the Death of her Baron, waive
her Remitter, and where not.*

The Law shall adjudge the Wife in of her better Estate, as by the Cases foregoing may abundantly appear: But if both Estates be waveable, there albeit the Wife is *prima facie* remitted; yet,

yet, after the Decease of her Husband, she may elect which of the Estates she will. As if Lands are given to Baron and Feme, and their Heirs; the Baron makes a Feoffment in Fee, the Feoffee gives the Land to the Baron and Feme; and the Heirs of their two Bodies, the Baron dies; in this Case the Wife may elect which of the Estates she will. 1 Inst. 357.

So is *Hobart* 71. *Sheerly* and *Wood's Case*, which was this:

Dower of Sir H. B. The Tenant pleaded, That Sir H. B. was seised in Fee of the Lands, &c. and made a Feoffment thereof to the Use of himself and the Demandant D. for the Term of their Lives for her Jointure, the Remainder over to B. Sir H. B. died; and the Feme enter'd, claiming it for her Jointure. The Plaintiff reply'd, That the said Sir H. B. before this Feoffment, did covenant to stand seised to the Use of himself in Tail, the Remainder to his Wife for the Term of Life, the Remainder to H. in Tail, and after made the Feoffment *prout*, and then died *sans Issue*, and she enter'd, and was remitted claiming the Estate by Indenture. The Tenant rejoins, That the Feme, after the Death of her Baron, enter'd claiming her Estate for Life by the Feoffment, and demurred. 1. *Per Curiam*, The Remitter to the Husband could not work till her Husband was dead *sans Issue*, because till then the Possession and Right did not meet in her.

Possession and Right must meet.

Where the Feme shall be in her Remitter *nolens volens*.

2. Because both the Estates were made to her during the Coverture, regularly after the Death of her Husband she might claim which Estate she would; yet in this Case she shall be in her Remitter *nolens volens*, for the Benefit of him in Remainder by the first Conveyance.

Hob.

Hob. 71, 255. Wood and Shirk, and affirmed in a Writ of Error. Cro. Jac. 489.

If a Feme Covert be Tenant for Life, and the Baron and Feme accept of a greater Estate of him in the Reversion, yet after the Death of her Baron she may waive it, and claim her first Estate for Life. 2 Saund. 386.

A. seised of Land in *jure uxoris* for her Life, made a Feoffment in Fee to the Use of his Wife for Life, the Wife is remitted, and is not like Amy Townsend's Case, where the Entry of the Wife was not lawful; for she was Tenant in Tail, which Estate was discontinued by the Feoffment of the Baron. And Sydenham's Case was: B. seised in *jure uxoris* of a Term for the Life of the Wife; they both surrender'd and took back the Lands to them, and a third Person; it was held that the Wife was not presently remitted, but after the Death of the Baron she might disagree to the Estate. 3 Leon. 93.

Of Disagreement by the Baron.

No Disagreement of the Husband shall devest the Remitter.

1. Because the Estate made to the Wife, which wrought the Remitter, is vanish'd and defeated.

2. Because she is restored to her ancient and better Right.

3. Remitters tend to the Advancement of ancient Rights.

Where a Warranty descending on an Infant or a Feme Covert shall be a Bar, and where not.

Where the Entry of a Feme Covert or Infant is not lawful, when the Warranty descendeth
on

on her during the Coverture, the Warranty doth bind them and her; and the Reason is, because the Estate whereto the Warranty is annex'd continueth, and cannot be avoided but by Action, in which the Warranty is a Bar.

The Father Tenant for Life, the Remainder to his Daughter and Heir apparent (a Feme Covert) in Fee; the Father makes a Feoffment to divers Uses with Warranty, and after levies a Fine with Warranty and dies, the Daughter, by Consent of her Husband, enters within the Year after the Fine claiming the Land as her Inheritance; the Entry by the Feme only by Consent of the Husband is good, and the Warranty descending upon her during the Coverture, where her Entry is congeable, doth not bind her; neither doth it bind the Husband, because it descends not upon him; and being void to bind her, shall not bind him. *Gro. Eliz. p. 72. Ardes and Symphon.*

Where the Warranty of the Baron, being Tenant by the Courtesy, shall be a Bar to the Issue of the Wife, and where not. Where the Feme shall vouch her Husband.

If the Husband be seised of Lands in the Right of his Wife, and makes a Feoffment in Fee with Warranty, the Husband dies; this Warranty shall not bind the Heir of the Wife without Assets, though the Husband be not Tenant by the Courtesy. *1 Inst. 366.*

If a Man infeoff a Woman with Warranty, they intermarry, and are impleaded; upon the Default of the Husband the Wife is received, she shall vouch her Husband notwithstanding the Warranty was put in Suspence; and so on the other Side, If a Woman infeoff a Man with Warranty, and they intermarry, and are impleaded, the Baron shall vouch himself and his Wife by Force of the said Warranty. *1 Inst. 390. a.*

*Where Baron and Feme shall take by Intireties,
and where by Moieties.*

Baron and Feme are Joint-tenants, and after they intermarry, they shall take by Moieties; but of Land given them after Marriage, they take by Intireties; for Baron and Feme cannot take by Moieties during the Coverture. I let Lands to a Feme sole for her Life, who marries, and afterwards I confirm the Estate of the Baron and Feme, *Habendum* for Term of their Lives; the Husband doth not hold jointly with his Wife, but holdeth in the Right of his Wife for Term of her Life, *causa qua supra*: 1. Because the Wife hath the Whole for Life. 2. Joint-tenants must come in by one Title. But if I let Land to a Feme sole for a Term of Years, who taketh Husband, and after I confirm the Estate of the Husband and Wife, to have and to hold the Land for the Term of their two Lives; in this Case they have a joint Estate of Freehold of the Land, for that the Wife had no Freehold before; so the same Law is of a Reversion in both Cases, and the Chattel of the Feme Covert is drown'd: But if Land is let to a Feme sole for Life, who marries, and a Confirmation is made to the Baron and Feme, they are Joint-tenants of the Fee-simple, and the Husband seized in the Right of his Wife for her Life, for the Baron and Feme cannot take by Moieties during the Coverture.

Baron and Feme cannot take by Moieties during the Coverture.

If a Man letteth Land to the Husband and Wife, *Habendum* the one Moiety to the Husband for Term of his Life, and the other Moiety to the Wife for the Term of her Life, and the Lessor confirms the Estate of both in the Land; *Habendum* to them and their Heirs; by this Confirmation,

firmation, as to the Moiety of the Husband, it enureth to the Husband only and his Heirs, for the Wife had nothing in that Moiety: But as to the Moiety of the Wife they are Joint-tenants, for the Husband hath such an Estate in his Wife's Moiety in her Right, as is capable of a Confirmation. 1 *Inst.* 299.

There are no Moieties between Baron and Feme. If Tenant in Tail enfeoff a Woman in Fee and dies, and the Issue within Age taketh the Woman to Wife, this is a Remitter to the Infant within Age; and the Wife then has nothing, for that the Husband and Wife are one Person in Law, and therefore the Land cannot be parted by Moieties. But if an Estate be made to a Man and a Woman, and their Heirs, before Marriage, and after they marry, the Husband and Wife have Moieties between them.

If Lands are given to two Men and a Woman in Fee, and afterwards one of them intermarries with the Woman, and alieneth the Land and dieth, in this Case the Wife hath Right but to a third Part; but if the Man and the Woman had been married before the first Feoffment, then the Woman, notwithstanding the Alienation of her Husband, had Right to a Moiety of the Land.

Baron and Feme, and a third Person, purchase Lands jointly.

Baron, Feme, and a third Person purchase Lands jointly, the Baron alien'd the Whole, he and his Wife died, the third Survivor shall have Affize of all. *Hob. p. 3.* For all survives to the third Person; for the Joint-tenancy was not severed by the Alienation of the Husband, for the Wife and the third Person may join in a Writ of Right. 31 *H. 6.* Entry Congeable 54.

A Joint

A Joint Estate of Land is made to a Baron and Feme, and to a third Person; in this Case the Baron and Feme have in Law but a Moie-ty, and the third Person shall have the other Moie-ty; for they are but one Person in Law. The same Law is where an Estate is made to the Baron and Feme, and two other Men; in this Case the Baron and Feme have but a third Part, and the other two Men the other two Parts.

A Joint Estate is made to Baron and Feme and a third Person, or to Baron and Feme and to two other Persons.

At Common Law, if Land had been given to the Baron and Feme, and a third Person, and to their Heirs, and the Baron had made a Feoffment in Fee, this had been a Discontinuance of the one Moie-ty, and a Disseisin of the other Moie-ty; so as after the Death of the Baron the Wife hath a Right of Entry for one Moie-ty, and the other Joint-tenant a Right of Entry in the other.

A Feoffment is made before the Statute of 27 H. 8. to the Use of a Man and a Woman, and the Heirs of their two Bodies, and they intermarry, and after Marriage the Husband sells the entire Land, and dies *sans* Issue; and after the Statute of 27 H. 8. was made, the Wife claims the Entry by Survivor, as Tenant in Tail after Possibility, &c. *Per Curiam*: She shall have but a Moie-ty, by reason of the Joint-tenancy before Marriage; but the Issue, if any be, shall have a *Formedon* of the Whole. *Plowd.* 483. 1 Co. 102. b. 4 Leon. 198. 10 Co. 68, 102. 2 Co. 66.

Tenant in Tail enfeoffs a Woman in Fee, and dies, and his Issue within Age taketh the same Woman to Wife; this is a Remitter to the Infant, and the Wife hath nothing; for that the Baron and Feme are one Person in Law, and then if the Heir be in Remitter by Force of the

Tail, then it follows, that the Wife hath nothing, because the Land cannot be parted by Moieties, and the Freehold and Inheritance of the Wife is vanish'd clear away. *Litt. Sect. 665.*

Of Lands recover'd in Value during the Coverture, no Moieties.

Of Land recover'd in Value during the Coverture, there shall not be Moieties, although they had Moieties in the Land recover'd against them. *Plowd. 183.*

If a Feoffment be made to a Man and a Woman, and to their Heirs with Warranty, and they intermarry, and after are impleaded, and vouch and recover in Value, Moieties shall not be between them; for though they were sole when the Warranty was made, yet at the Time when they recover'd and had Execution, they were Baron and Feme, in which Time they cannot take by Moieties.

Where they take by Interties.

A Man gives Land by his Will to his Wife for Life, and dies; his Wife marries *B.* the Heir of the Devisor by Deed inrolled sells the said Lands to Baron and Feme, *Habendum* to them, their Heirs and Assigns to their own Use, and then the Wife had Issue a Son, (who was by the Will to be christen'd by such a Name); this, by this Conveyance made by the Brother and Heir of the Devisor before the Birth of the Son, hath destroy'd the contingent Remainder; and the Baron and Feme took by Interties, and the Estate for Life in the Wife, in the intire Tenancy, was merged. *2 Sand. 386.*

Where a Recovery binds not the Wife's Moiety.

Lands are given to *A. B.* and *C. D.* a Feme, and the Heirs of the Body of *A. B.* *A. B.* and *C. D.* intermarry, the Baron suffers a Common Recovery against himself only, without naming his Wife, the Recovery is falsify'd for one Moiety, because the Wife, who was Joint-Tenant with *A. B.* was not named, and Party to the Recovery: This Recovery binds not the
Moiety

Moiety of the Wife, Lord Norris's Case. 1 Leon. 270. 3 Co.

Copyhold Lands are surrender'd to the Use of the Wife for Life, the Remainder to the Use of the right Heirs of the Husband and Wife, the Husband enter'd in the Right of the Wife. *Per Curiam*: The Remainder was executed for a Moiety presently in the Wife, and the Husband was seised of that in the Right of his Wife, and the Wife dying first, her Heir shall have it; but if the Husband had died first, his Heir should have had one Moiety.

Where the Heir shall only have a Moiety.

3 Leon. p. 4.

A Reversion is granted to a Man and a Woman, and their Heirs; and before Attornment, they intermarry, and then Attornment is made; in this Case, the Baron and Feme have no Moieties. So in the Case of a Letter of Attorney to make Livery.

Attornment.

If a Feoffment were made before the Statute of 27 H. 8. *Of Uses*, to the Use of a Man and a Woman, and their Heirs, and they intermarry, and then the Statute is made; if the Husband alien, it is good for a Moiety; for the Statute executes a Possession according to such Quality, Manner, Form, and Condition as they had in the Use; so as though it vest during the Coverture, yet the Act of Parliament executes several Moieties in them, seeing they had several Moieties in the Use.

Where Baron and Feme, and a Stranger are Joint-tenants, the sole Alienation of the Baron shall bar the Stranger surviving, and where not.

1 Inst. 187. b.

If the Reversion be granted to a Man and a Woman, they are to have Moieties in Law; but if they intermarry, and then Attornment is had, they shall have no Moieties, because it is by Act of Law, tho' by the Purport of the Grant they were to have Moieties. 1 Inst. 310. a.

By Attornment they have no Moiety.

Difference between joint Alienations and several.

If two Femmes be jointly seised, and they take Husbands, and the Husbands join in an Alienation, and die, the Wives are Joint-tenants of the Right, and may join in a Writ of Right, or they may have several *Cui in vita's* at Election; but when they have recover'd in those several Writs, they shall be Joint-tenants again: But if the Husbands had alien'd severally, this had been a Severance of the Jointure for a Time.

Where Baron and Feme shall be Joint-tenants.

If a Man make a Feoffment in Fee to the Use of himself, and of such Wife as he should afterwards marry, for Term of their Lives, and afterwards he taketh Wife, they are Joint-tenants, and yet they come to their Estate at several Times. 1 *Inst.* 188. a.

What is a Severance of the Jointure.

If a Feme Covert and *J. S.* are Joint-tenants for Life of a Copyhold, and *J. S.* surrenders his Moiety to the Husband; this is a Severance of the Jointure, so that he is Tenant in common with his Wife. 14 *Jac. Lane and Pannel.*

Lease an actual Severance.

If a Feme Covert and *J. S.* are Joint-tenants for Life, and the Baron and Feme, by Indenture, let the Moiety of the Wife for Years, rendring Rent, and after the Wife dies, the Survivor shall not avoid this Lease, because this was, and is the Lease of the Wife *prima facie*, till she disagree to it; and only avoidable, and the Survivor is not privy to her to avoid it, for the Lease was an actual Severance during the Years. 14 *Jac. Roll. Rep. Smalman and Ayborough.*

Where a Release shall ensure to the Husband sole, and not to the Wife

Baron and Feme, and a third Person, purchase Land to them and the Heirs of the Husband, and the third Person releaseth to the Baron all his Right, &c. without the Word *Heirs*, and afterwards the Baron and Feme make a Lease of all for Years, rendring Rent to them and the Heirs of the Baron; the Baron dies, the Heir shall have the Moiety of the Rent after the

the Death of the Baron, and a Release to the Husband only, shall enure to him sole, and not to the Wife. *Dyer* 263.

C H A P. XVI.

Conveyances.

What shall be said to be the Deed of the Husband and Wife. Of a Feoffment by the Husband of the Wife's Land. Where the Wife's Grant, if she join with her Husband, is void or not. Surrender by the Husband, how it operates. What shall amount to a Surrender, or not. Of a Release of the Husband of the Wife's Right to Rent. Of his Release of Money to be paid after the Wife's Decease. Of Exchanges of the Land of the Wife, and what shall be a good Confirmation of it by the Wife. How a Man may execute an Estate to his Wife. Of the Christian Name of Women in Grants.

DE B T on a Bond, condition'd for the Performance of Covenants in an Indenture made between S. and Anne his Wife of the one Part, and the Plaintiff on the other. The Defendant pleads the Indenture, as an Indenture of W. S. and Anne his Wife, whereas in Truth the Feme never sealed it. The Plaintiff replies, That the Indenture shew'd by the Defendant *non fuit facta inter* W. S. and Anne his Wife, on the one Part, and the Plaintiff on the other. The Jury find the Baron sealed it, but the Wife did not: This Verdict is found against the Defendant, who pleaded it as the Deed of the Wife. And *per Curiam*; The Plaintiff is not

What shall be said to be the Deed of the Husband and Wife.

estopped to say, that the Deed shew'd is not the Deed of the Baron and Feme; but he is estopped by the Condition to say, there is not any such Indenture. But if the Baron had sealed and deliver'd it in the Name of the Feme, it had been the Deed of the Wife during the Life of the Husband; and if they by Indenture bargained and sold the Land of the Wife, rendring Rent, it had been a good Deed of the Feme, because she afterwards might have accepted the Rent, and affirmed it as her Deed: And Judgment was *pro Quer.* Cro. Eliz. 269. Ship and Sreed.

Feoffment.

Baron and Feme make a Feoffment of the Wife's Jointure, which she had by a former Husband, to one and his Heirs, to the Use of Feoffee for the Life of the Wife, this is a Forfeiture; for by the Feoffment the Fee-simple passeth, and that to the Use of the Feoffor; and the Estate and the Use are several Things, and the Limitation for the Life of the Wife cannot extend to both. 1 Leon. p. 126. Pierce and Hoe.

By Acceptance of the Rent, the Feoffment is affirmed.

Baron and Feme join in a Feoffment of the Wife's Land, rendring Rent; the Husband dies, the Feme takes a new Husband before any Rent-Day, the second Husband accepteth the Rent, the Feoffment is affirmed for ever.

Feme Covert may request a Re-infeoffment without her Husband.

If a Feme Sole make a Feoffment, on Condition to re-enfeoff her at what Time she will, and after takes Husband, she may require the Feoffee to re-enfeoff her without her Husband; and if the Feoffee refuse to do it, the Condition is broken.

Where

Where Baron and Feme Infants join in a Feoffment by Indenture, the Feme after the Death of her Husband may have a *Dum Dum fuit infra ætatem*; *secus* where her self was of full Age at the Time of the Feoffment, for there she shall not have a *Dum fuit infra ætatem*, for the Non-age of her Husband, albeit they be but one Person in Law. 1 *Inst.* 337. a.

Baron seised in Fee makes a Feoffment to the Use of himself and his Wife, and to the Heirs of the Survivor of them, and afterwards makes a Feoffment of the same Land, and dies, the Feme enters; in this Case the Feoffment of the Husband hath destroyed the Contingent Use of the Wife. *Cro. Car.* 102.

One being enfeoffed to the Use of a Feme Sole, she takes an Husband who sells the Land to a Stranger, the Feme received the Money, the Husband and Wife pray him, that was enfeoffed to the Use of the Wife, to make an Estate to a Stranger; this Sale in Equity ought to be construed the Sale of the Husband alone, and it shall not be esteemed that the Wife did it, for the Deed of the Baron and the Receipt of the Money by her is not material, because she cannot have the free Disposal.

One being possessor of a Lease of Tithes in the Right of his Wife, as Executrix to her former Husband, grants *totum jus, titulum & interesse suum de & in decimis prædictis*. Verdict was *pro Quer.*, who claimed under the said Grant. It was moved in Arrest of Judgment, that the Declaration was not good, for he hath not set forth any good Title to enable himself to the Tithes. But *per Curiam*: The Grant is good, and the Lease he had in the Tithes in the Right of the Wife did pass, for he granted *totum jus &c. suum*, and the Word *suum* doth import a Propriety

Feoffment of the Husband destroys a Contingent Use.

Sale of Land in Equity is the Sale of the Husband alone, though the Wife received the Money.

By the Grant of totum jus suum what passeth.

priety in Possession, and it is all one as if it had especially named them in the Grant. *Cro. Car.* 318. *Arnold and Bidgood.*

Stat. 13 Eliz.
cap. 2. expli-
cated

Where Infant Baron and Feme make a Conveyance to the King by Bargain and Sale, this is not aided by the Statute of 13 *Eliz. cap. 2.* for that aids only where there is Imperfection in the Conveyance, and not where there is Disability in the Person that makes the Conveyance: But where Tenant in Tail makes a Conveyance by Deed, that is aided by the Statute, for he may make a Conveyance by Fine. *Cro. Jac.* 364.

Two Husbands and their Wives join in a Grant of the Lands of their Wives, and covenant that they have Right to convey, and covenant to make a farther Assurance within seven Years, and one of the Wives is within Age at the Time of making the Deed, and the Right of her Lands descended to her Son, an Infant, by which the Moiety of the Estate was devested out of the Plaintiff. *Per Curiam*: The Wife being within Age at the Time of the Covenant, as appears by the Verdict, had not Power then to convey the Estate according to the Covenant, and there was no Request to make the Assurance. *Per Curiam*: The Death of the Wife in the Infancy of her Son was the Act of God, and it was the Default of the Plaintiff that he did not demand Assurance in the Life of the Wife, and after her full Age. *Sir Thomas Jones* 195. *Nash and Ashton.*

Bargain

Bargain and Sale. Grant.

Where the Wife's Grant is void when she joins with her Husband, or not

A Bargain and Sale binds not a Feme Covert by Custom.

A Deed acknowledged by Baron and Feme shall by the Common Law be inrolled only for the Husband, and not for the Wife by Reason of the Coverture; and though it be inrolled for both, it binds not; *Aliter* by Custom, and no one hath Power to examine a Feme Covert but by Writ. 2 Inst. 673. But

A Feme Covert in *London* may be examined, and then she shall be bound by a Deed inrolled. *Custom of London.* Hob. 225.

Now if the Husband is seised in the Right of his Wife, and bargains and sells by Deed inrolled to another, this is an Estate of Freehold; for this is an Estate during Coverture. 2 Roll. Abr. 845.

S. and his Wife being seised of the Parsonage of, &c. to them and the Heirs of S. did give the same to King *Henry* the Eighth and his Heirs by their Deed, the King by his Letters Patents granted it over, the Wife's Grant is void. Hob. 224, 5. *Anne Needler's Case.*

Surrender.

Baron and Feme Joint-tenants for Life, the Baron may well surrender to him in Reversion, and this shall bind the Husband though not the Wife, nor shall be any Discontinuance to her; yet this is not a good Surrender during the Life of the Baron. *Keilw. 42.*

If

What is a Surrender, or not.

If Lessee for Life enfeoff Baron and Feme in Reversion, in Right of the Wife, this is a Surrender; (admitting it not a Forfeiture) but if Lessee for Life grant his Estate to Baron and Feme in Reversion, in Right of the Wife, this is not any Surrender for the Benefit of the Baron. 21 H. 7. 40.

M. and J. his Wife take a Lease jointly for their two Lives, and now by new Indenture take a new Lease to them two and the Survivor; the Acceptance of the second Lease to commence *a die datæ* is a Surrender, because they conclude then that the Lessor had Power to make a new Lease, which he cannot do unless the former be surrendered. Moor 636. Mellow and May's Case.

If Feme Lessee for Years take Husband, who after accepts a new Lease for Lives, this is a Surrender of the first Lease. Plowd. 199. Wroth and Adams.

Baron and Feme cannot expressly, nor by Acceptance of a new Lease surrender the Wife's Freehold so as to bind her surviving. Hobart p. 203, 234.

Baron and Feme are seised in the Right of the Wife for Life of the Wife, and the King grants this to the Wife for Life of the Wife, with Remainders over by new Letters Patents in Consideration of the Surrender of the first Estate; this is a void Grant, for that this Surrender is not absolute, inasmuch as the Wife after the Death of the Baron may claim her first Estate. Hob. Swain and Holman.

Release. Vide Fine.

Baron and Feme are Lessees *pur auter vie* the Lessor may enlarge their Estate by Release for their own Lives. 2 Roll. Abr. 401.

Covenant was that a Stranger should pay 8 l. yearly to one of the Covenantees, and to one F. S. a Stranger; F. S. took Husband one B. who did release the Payment; the Question was, Whether by this Release the Defendant shall be discharged of Payment? B. is a Stranger, to whose Wife the Payment is to be made. Now he cannot release this, he having no Right at all therein; the Release is made by a Stranger who had nothing in the Thing, nor yet any Remedy to come by it: And Judgment was for the Plaintiff. 3 *Bulstr.* 27. *Quick and Harris versus Ludborough.*

Release by the Husband pleaded to an Action brought by the Wife after his Decease, for Money to be allowed her after his Death, not good. *Brownl.* 15. *Belcher and Hudson*, p. 18. *Smith and Stafford.*

Exchange.

If Baron and Feme exchange with another, this is good during the Coverture. 39 *E.* 3. 30.

If the Husband exchange the Land of the Wife for Land of less Value, if the Wife after his Death once agree to the Exchange, she shall never avoid it afterwards. 9 *H.* 6. 52.

The Husband and Wife were seised of Lands in the Right of the Wife, they both joined in Exchange of the Land to a Stranger for other Lands, which Exchange was executed; the Husband and Wife seised of the Land taken in Exchange aliened the same by Fine. *Per Curiam*: The Wife after the Death of the Husband may enter into her own Land notwithstanding the Fine. 1 *Leon.* p. 285.

By

By the Woman's Acceptance of Dower out of Lands exchanged she agrees to the Exchange; 3 Leon. 27.

Of a Feme Covert's being a Purchaser, and how it shall be good.

A Feme Covert cannot take any Thing of the Gift of the Husband, but is of a Capacity to purchase of others without the Consent of her Husband, but her Husband may disagree thereto, and develt the whole Estate; but if he neither agree nor disagree, the Purchase is good; but after his Death, although her Husband agreed thereto, yet she may without Cause alleged wave the same; so may her Heirs also if after the Death of the Husband she agreed not thereunto. 1 Inst. 3. 2.

How a Man may execute an Estate to his Wife.

By no Conveyance at the Common Law a Man could, during the Coverture, either in Possession, Reversion or Remainder, limit an Estate to his Wife: But a Man by his Deed may covenant with others to stand seised to the Use of his Wife, or make a Feoffment or other Conveyances to the Use of his Wife, and now the Estate is executed to such Uses by the Statute of 27 H. 8. But a Man cannot covenant with his Wife to stand seised to her Use, because he cannot covenant with her, for that they are one Person in Law: And yet if *Cestuy que use* had devised his Wife should sell his Land, and made her Executrix, and died, and she took another Husband, she might sell the Land to her Husband, for she did it *en auter Droit*, and the Husband shall be in by the Devisor. Sc

if a Charter of Feoffment be made to the Wife, the Husband as Attorney to the Feoffor may make Livery to the Wife. 1 *Inst.* 112.

Of Christian Names of Women in Grants, whether one or several.

Joban makes a Lease by the Name of *Jane*,
Quare.

A Grant to *T.* and *Ellen* his Wife, where her Name is *Emmelin*, yet it is good, because it is the Wife of *T.* 2 *H.* 4. 25. For Wife *Uxor* is a good Name of Purchase, as *uxori* *J. S.* So if a Christian Name be added and mistaken, as *Em' pro Emmelin*; for *utile per inutile non vitiatur.* 1 *Inst.* 3. a.

Agnes and *Anne* are several Names of Baptism, and not one Name. *Cro. Jac.* 425.

Jane and *Joan* are but one Name, and not distinct several Names. *Mich.* 15 *Jac. B. R.* *Griffith* and *Middleton.*

Isabel and *Sybil* are distinct Names of Baptism, 1 *Aff.* 11.

C H A P. XVII.

Leases.

Of a Lease for Lives made by Baron and Feme. Of a Lease made by the Husband of the Wife's Land, and how and wherein it shall bind the Wife, or not. What shall be a good Lease warranted by the Statute of 32 H. 8. c. 28. The Qualifications of such Leases to bring them within the Statute. What Acceptance of the Husband shall affirm a voidable Lease. What is a good Lease by Baron and Feme to bring Ejectment of Leases for Years made to Baron and Feme. Diversity between a Lease for Life and a Lease for Years made to a Feme Covert. Lease to a Feme Covert when it shall be said to vest. Of a Lease for Life made to Baron and Feme. If the Husband may grant it when the Lease is made to Baron and Feme. If the Husband may grant it when the Lease is made to the Survivor for Years. How if the Remainder be to the Heirs of the Survivor. Of Leases for Life made by Baron and Feme. Diversity where Livery is made by the Lessor in Person, and where by Letter of Attorney.

Lease for Years made by Baron and Feme. Vide Tit. Rent.

By the Husband of the Wife's Land, and how and wherein it shall bind the Wife, or not.

By the Baron sole.

Voidable, not void.

THE Husband makes a Lease of the Wife's Land, and dies, the Lease is not determined

mined nor void after the Death of the Husband, but voidable only by the Entry of the Wife after his Death. *Cro. Jac. 332. Jordan and Wikes.* But,

If Baron seised in Fee in the Right of his Wife had Issue by her, and so is Tenant by the Courtesy, and after makes a Lease for Years, reserving Rent, and after the Wife dies, and after the Husband dies before the End of the Years, yet this is void and ended in the Law before any Entry of the next Heir of the Wife, forasmuch as he cannot make this good by any Acceptance of the Rent, the Lease being made only by the Husband. *1 Roll. Abr. 380, 381. Cro. Car. 399. Miller and Manwaring.*

But if the Husband makes a Lease of the Wife's Land, and dies, this Lease is not determined nor void after the Death of the Husband, but voidable only by the Entry of the Wife after his Death. *Cro. Jac. 332. Jordan and Wikes.*

If Baron and Feme lease for Years by Indenture, rendring Rent, where the Husband had all the Estate in the Land, and the Wife nothing, after the Death of the Baron, the Lessee in an Action of Debt for the Rent brought by the Wife shall not be estopped, to say that at the Time of the Lease made, the Wife had nothing in the Land; for this doth not enure by Way of Estoppel, forasmuch as it enures by Way of Interest. *1 Roll. Abr. 877. Brierton and Evans. Cro. Eliz. 701. mesme Case.*

Where a Lease enures by Way of Interest, and not by Estoppel.

By Baron and Feme.

What shall be a good Lease warranted by the Statute of 32 H. 8. cap. 28. Or,

Q

What

What Lease for Years made by Baron and Feme shall bind the Wife and her Heirs, or not, *Vid. 1 Inst. 44, 45.*

By the Statute of 32 H. 8. any Husband and Wife seised of any Estate of Inheritance in Fee-simple or Fee-tail in the Right of the Wife or jointly with his Wife before the Coverture or after, this shall bind the Wife and her and their Heirs; but such Leases must have these Qualifications.

1. They must be by Deed indented.
2. They must begin from the Day of the Making thereof, or from the Making thereof.
3. There must not be a double Lease in Being at one Time.
4. It must not exceed one and twenty Years or three Lives from the Making.
5. It must be of Lands, Tenements or Hereditaments manurable.
6. It must be of Lands or Tenements which have most commonly been letten to Farm or occupied by the Farmers thereof, by the Space of twenty Years next before the new Lease made.
7. There must be reserved the yearly accustomed Rent, which must be reserved to the Baron and Feme and to the Heirs of the Feme.
8. They must not be made without Impeachment of Waste.

If they are made with these Qualifications they shall bind the Wife and her Heirs; but if they are not warranted by this Statute, yet they shall be good against the Husband.

The Wife must join in the Lease and be made Party to it, and seal and deliver the same in Person; and if it be for Life or Lives, there must

must be Livery and Seisin. *Cro. Jac. 563. Greenwood and Tyler.*

The Husband purchased Lands to him and his Wife and their Heirs, he afterwards, his Wife not being Party, let those Lands to L. and T. for 60 Years, if they lived so long, rendering Rent, this Lease shall bind the Wife by the Statute of 32 H. 8. cap. 28. for it is not within the Proviso, for that it is not the sole Inheritance of the Wife. *Cro. Car. 22. Smith and Trinder.*

If a Man possess of a Manor for 99 Years, makes his Will and deviseth it to A. his Wife, for her Life, to set, let or make Estates out of it, and them in as ample Manner, as my self might, if I were living, during the said Term; and after the Death of A. deviseth it to B. his Daughter, and to the Heirs of her Body begetting, and dies, A. being Executrix consents to the Legacy, and after makes a Lease of a certain Parcel of the Manor to C. for 99 Years, if three Lives shall so long live, and so; this is a good Lease against B. the Daughter, although it was objected that by this Clause she had only Power to dispose of it during her Life. *2 Roll. Abr. 261.*

Construction of the Words of the Will importing to make a Lease.

Baron and Feme seised of Lands in the Right of the Wife, levied a Fine to the Use of themselves for their Lives, and afterwards to the Use of the Heirs of the Wife; Proviso that it shall and may be lawful to and for the Baron and Feme, at any Time during their Lives, to make Leases for one and twenty Years, or three Lives; the Wife being Covert made a lease for one and twenty Years, and adjudged a good Lease against the Husband, though it was made when she was a Feme Covert,

Proviso to make Leases.

and by her alone, and this by Reason of the Proviso. *Godb. 327. pl. 419. Quære.*

Forfeiture or not.

Tenant for Life takes Husband, and by Deed indented they make a Lease to him in Reversion for the Life of the Husband, reserving Rent, this is no Forfeiture; for he in the Reversion was Party, and a Surrender it is not, for their whole Estate was not given, and the Reservation is good. *1 Inst. 42. a.*

Baron makes a Lease, then Baron and Feme levy a Fine; the Lessee shall avoid the Lease.

Baron and Feme seised of Land in the Right of the Wife, the Husband alone makes a Lease for Years, afterward Baron and Feme levy a Fine, and they afterwards doth die, the Lessee shall avoid the Lease. *1 Leon. 247. Harvey and Thomas.*

A Lease is made by Baron and Feme *in jure uxoris*, and he dies, and she accepts the Rent, it is good against her. *Cro. Jac. 563. 2 Anders. 42.* For by her own A&C she hath affirmed that the Estate continues.

Second Husband accepts the Rent, it binds the Wife.

Baron and Feme make a Lease by Indenture for Term of Years, rendering Rent, the Lessee enters, the Husband before the Day of Payment of the Rent dies, and the Wife also before the Day of Payment takes a second Husband, who accepts the Rent at the Day, and dies, the Wife may not oust the Termor. She might have avoided the Term before the Day at her Pleasure; but that Liberty she had assigned to her second Husband. *Dyer 159.*

Vide plus sub titulo, What shall be a Disposition of the Wife's Term, or not.

It was held *Pasch. 18 Eliz. in C. B. Que si Baron & Feme sont & font Lease de terres del Feme per fait Indent' pro 21 ans de le date de fait reservant Rent, &c. Le Baron & Feme*

Feme ou l'un deux adonque esteant deins age de 21 ans, ceo lease n'est garrant estre bon per Stat. 32 H. 8. Et uncore fuit tenus que si Jointment soit fait al Feme deins age avant que el soit Espouse & puis est marry, & son Baron morust que el ne poit wave ceo Jointment & demand estre endowed de tierce part de tous les terres de que son Baron morust seise. Mes Jera lie per ceo Jointment fait avant les Espousals per reason de Stat. 27 H. 8. cap 10. come al temps de seissance de Jointment el ad estre de plein age. Ex Manuscript. Mri. Brownloe.

If a Feme sole being a Widow be seised of Lands, and secretly takes Husband, and conceals her Marriage, and so continuing under the Notion of a Widow, makes Leases of divers Parts of Land, and afterwards the Time of her Marriage is published, the Husband in Equity ought to avoid the Leases, but was denied Relief, and decreed in Chancery to confirm the Leases during the Term.

Wife conceals her Marriage and makes Leases as a Widow; the Husband decreed in Chancery to confirm the Lease.

Lease for Years by Baron and Feme without Deed, is void, as to the Feme. *Cro. Eliz. 36.*

Baron and Feme (in the Right of the Feme) and a third Person were Joint-tenants for the Lives of the Wife, and of the third Person, the Baron and Feme by Indenture let the Moiety for 21 Years, the Feme dies, the surviving Joint-tenant enters: Lessee brings Trespass, and recovered; for the Lease is good, and is as a Lease made by her, until she after Coverture, or one who claims in Privy by her, avoids it by Entry: For it is not void by the Death of the Baron, but voidable, and the Avoidance might be by Entry; and this cannot be by the Joint-tenant's Survivor, for he is paramount the

Baron and Feme Joint-tenants with another; she and her Husband make a Lease, and the Wife dies, the Lease is good against the Survivor.

Wife, and so the Lease shall bind as long as any Joint-tenant be alive. *Cro. Jac.* 417. *Smallman* and *Ayborows*. 1 *Roll. Rep.* 441. *Mesme* Case.

Power to make
Leases.

If a Man demise Lands to B. his Wife for Life, the Remainder to C. in Fee, and by a Codicil he deviseth that B. shall have a Power six Months before his Death to lease this for six Years. B. takes a second Husband, she and her second Husband may lease this by Deed or without Deed for six Years; and if they lease this *Habend. a die datus*, it is good. 1 *Roll. Abr.* 329.

Lease of Eject-
ment by Baron
and Feme.

Lease by Indenture signed and sealed by Baron and Feme (of the Wife's Land) and a Letter of Attorney by Baron and Feme to deliver it on the Land in both their Names; and the Declaration was of a Lease by the Baron only, and not in the Name of the Wife in Ejectment; the Declaration is good; for the Delivery by the Attorney is a void Delivery, and void Warrant as to the Wife, and so it is the Lease of the Baron only: But if the Lease had been delivered upon the Land by Baron and Feme, it had been a good Lease for both. But now it is the Lease of the Baron only, and not voidable, but void against the Wife. *Cro. Jac.* 617. *Gardner* and *Norman*; and so in *Wilson* and *Rich's* Case. *Yelv.* 1. in such Case the Declaration was by Baron and Feme; and adjudged the Lease is the Lease of the Baron sole, and doth not maintain the Declaration. But in *Cro. Car.* 165. *Hopkin's* Case *contra*, where the Lease was sealed and subscribed by them both, and a Letter of Attorney made by them to deliver it upon the Land. *Et per totam Curiam*: It is a good Letter of Attorney for both, and the Lease

Lease well delivered, and it is the Lease of them both during the Husband's Life.

Leases for Years made to Baron and Feme.

There is a Diversity between a Lease for Life and a Lease for Years made to a Feme Covert. If I let Land to a Feme sole for Years, who taketh Husband, and after I confirm the Estate to Baron and Feme, To have and to hold to them for the Term of their two Lives, this Confirmation makes them Joint-tenants for their Lives, because the Chattel of a Feme Covert may be drowned, and the Husband hath such a Possession, in her Right, of a Chattel, as is capable of a Confirmation or a Release; but a Feme's Estate of a Freehold cannot be altered by the Confirmation made to the Husband and her, as a Term for Years may, whereof the Husband may make Disposition at his Pleasure. 1 *Inst.* 300.

Feme Lessee for Years upon Condition, that she, her Executors or Assigns, shall not alien without the Consent of the Lessor, she taketh Baron, and dies; the Husband is within the Danger of the Condition, for he is Assignee; in *Moor and Ferrand's Case*, 1 *Leon.* p. 3.

Where the Baron shall be Assignee to the Wife.

An Estate made to a Feme Covert, *de novo*, vests till the Husband's Dissent, but a new Lease made to a Feme, who was Lessee before, vests not till his Assent. *Hab.* 204.

Lease for Life made to Baron and Feme.

I let Land to a Feme sole for Term of her Life, who taketh an Husband, and after I confirm the Estate of the Baron and Feme, *Habendum* for Term of their Lives. In this Case

Confirmation.

the Baron does not hold jointly with his Wife, but holdeth in Right of his Wife for Term of her Life; but this Confirmation shall enure to the Husband by Way of Remainder for the Term of his Life, if he survive the Wife; he cannot hold jointly with the Wife, because the Wife hath the Whole for her Life, and Joint-tenants must come in by one Title. 1 Inst. 292.

Land demised to Baron and Feme for their Lives, Remainder to the Survivor for Years.

Land is demised to Baron and Feme for their Lives, the Remainder to the Survivor of them for Years; the Husband granted over this Term for Years, and died, the Wife shall have it, and not the Grantee, because there was nothing in the one or other to grant over but the Survivor; so if the Wife had died after the Grant, and the Baron survived, yet he shall have the Term against his own Grant. Poph. 4, 5. So if a Lease be made to Baron and Feme for their Lives, the Remainder to the Executors of the Survivor of them; and the Husband grant the Term and dies, this shall not bar the Wife, because the Wife had but a Possibility, and no Interest. Co. Litt. 46. b.

Remainder to the Heirs of the Survivor.

But if a Lease is made to Baron and Feme for their Lives, the Remainder to the Heirs of the Survivor; it is a good Remainder notwithstanding the Uncertainty; and in that Case the Husband, after the Death of the Wife, shall have Judgment to recover the Land. Godbolt 139.

Lease to Baron and Feme, and his Son for Life, the Son dies; he in pleading shall not say as amongst other Joint-tenants, *fuer' seisi' in dominico suo ut de libero Tenemento pro termino vite ipsorum patris ac filii per jus accrescendi*, but omitting.

omitting *per jus accrescendi*. Ex Manuscript.
Mri. Brownloe.

*Leases for Life made by Baron and Feme,
 ut supra.*

Lease by Baron and Feme. of the Lands of *Livery*.
 the Wife, *Habendum* from *Michaelmas* for Life; *Diversity*.
 and *Livery* is made after *Michaelmas*, *secun-*
dum formam Chartæ, it is good enough; and
 the Difference is where the *Livery* is made by
 the Lessor in Person, and where by Letter of
 Attorney, in the same Charter generally made:
 But if the Letter of Attorney be to make *Li-*
very after *Michaelmas*, it is good enough in
 both Cases; for there is not any Intention
 that the *Livery* should operate *in futuro*, but
 that *Livery* should be made when it should
 operate, and the Estate should be good pre-
 sently; and it differs from 2 Rep. 55. *Buckler*
and Harvey, where a Reversion was granted
Habendum after *Michaelmas* for Life, although
 the Attornment be after *Michaelmas*, yet it
 being the Act of a Stranger, shall not make
 that good which otherwise would be void:
 But here, when the Lessor makes *Livery* him-
 self after *Michaelmas*, it is well enough. Cro.
 Jac. 563. *Greenwood and Tyler*. Lease made
 by Baron and Feme, in Right of his Wife, to
 J. S. *Habendum* from *Michaelmas* following
 for Term of Life; after *Michaelmas* Baron and
 Feme make *Livery*, *secundum formam Chartæ*,
 it shall be good against the Wife to bind her;
 for the *Livery* alone did not make the Lease,
 but the *Livery* and Deed, and it took its
 Operation by both. And although, if *Livery*
 had been made before *Michaelmas*, it had
 been

been void to make it a good Lease; yet if being made after *Michaelmas*, it is made a good Lease by the Deed and Livery, and not by either of them solely; for the Livery, in this Case, is but the Execution of the Deed, and is a sufficient Witness of their Agreement, which is the Cause it ought to be by Deed to prove the Agreement of the Wife; and all Reservations, Covenants, and Warranties in the Deed, are good, and the Lessor and Lessee bound by them.

C H A P. XVIII.

Wills.

How and in what Cases a Feme Covert may make a Will. What she may devise without the Consent of her Husband. If she may make a Declaration in the Nature of a Will, without the Assent of the Husband. Several Cases of the Husband's being bound to permit his Wife to make a Will. Of Devises to the Wife by the Husband or others, and the Constitution of such Devises. What is a Devise by Implication, or not. Of a Feme Covert's assenting to a Legacy. If the Husband may devise the Term made to him and his Wife. Wife Legatee of Goods is made Executor, if the second Husband's Executor shall have them.

How and in what Cases a Feme Covert may make a Will, and it shall be good or not.

A Feme Covert may make a Testament, if her Husband agree to it after her Death. Mich. 8 Jac. B. Grant's Case.

A Feme Covert may not devise Things in Action which she hath, without the Assent or Agreement of the Husband; and by his Assent she may make Executors, or him to be Executor. 4 H. 6. 3. 39 H. 6. 27.

A Feme Covert Executrix may not devise any Goods she hath as Executrix, without the Assent of her Husband, or his Agreement afterwards, although she may make an Executor without his Assent. Grant's Case, *supra*.

Regu-

Regula.

Regularly a Feme Covert cannot make her Will; and therefore a Feme Covert made a Will, and devised 30 *l. per Annum* out of some of her own Land to a charitable Use; the Heir submits himself to an Award, and is bound to perform it; the Arbitrators award Payment of it, yet by Decree of Chancery the Heir is discharged of the Payment, and the Devise was void *ab initio*: The like Case of an Infant.

If a Feme Sole make a Feoffment to her own Use, and after takes Husband, and after makes a Will, that the Feoffees shall make an Estate to her Husband; and dies; this shall not be good in Chancery, because that all Acts by a Feme Covert are void, and there *Æquitas sequitur Legem*.

Declaration in
the Nature of
a Will.

But though a Wife cannot make a Will without her Husband's Assent, yet she may make a Writing or Declaration in the Nature of her Will, and it shall be good in many Cases, as was *Tilley and Pierce's Case*. *Cro. Car.* 376. Debt upon Bond conditioned: Whereas the Defendant was to espouse *A. S.* a Widow, if the Marriage took Effect, and he should survive the said *A. S.* there was paid to the Obligees 300 *l.* to and for such Uses and Purposes as she the said *A. S.* by any Writing under her Hand and Seal, subscrib'd and publish'd in the Presence of two Witnesses, should nominate, declare and appoint, then, &c. The Defendant pleads, she did not limit, declare, or appoint any Use or Purpose for the Employment of that Money. Plaintiff replies, that she, by her Will in Writing, seal'd and publish'd by her in the Presence of two Witnesses, [*naming their Names*] did will and appoint such Sums to be paid, and that the Defendant had not paid them, and on Arrest, Judgment *pro Quer'*.

The

The Condition of a Bond was: Whereas he had taken A. S. a Widow, to Wife, being possessor of divers Goods. If he should permit his said Wife to make a Will, and dispose in Legacies as much as she would, not exceeding 50 £ and pay and perform what she appointed, for that exceed not 50 £. that then, &c. The Defendant pleads, she made not any Will; and upon Issue it was found, that she made a Will, and did dispose of divers Legacies, not exceeding 50 £. but that she was Covert at the Time of making the Will; and Judgment *pro Quer.* for it is a Will within the Intent of the Condition, and it is but her Appointment which the Husband is oblig'd to perform. *Cro. Car. 219. Marriott and Kinsman.*

Condition of a Bond to permit a Wife to make a Will.

The like Case is *Cro. Car. 597. Sherman and Lilley*: The Condition was, to permit his Wife to make a Will of her first Husband's Goods to the Value of 100 £. to be paid within one Year after her Decease: That then, &c. Defendant pleads, That he permitted his Wife to make a Will, but does not plead that he paid it accordingly, and so the Plea was held to be ill.

It is held in 3 *Keb. 624.* Articles were made before Marriage, That the Wife shall make a Will, and the Husband to pay the Legacies devised. *Per Cur'*: Her Will is void, and the Husband bound only by the Articles to permit it. *Vide Mod. Rep. 211.*

In *Harris and Hestie's Case*, 1 *Keb. 347.* Authority was given to the Wife to devise 300 £. and she disposeth 200 £. by Fifties, and well *per Cur'*.

• If a Feme Covert make a Will, and devise Goods to another, and the Husband, after her Death, deliver the Goods to the Devisee accordingly, this shall bind him. 26 *Ed. 3. 71.*

*In what Cases
a Feme Covert
may make a
Will.*

A Feme settled her Estate in Trust, reserving a Power to give by her last Will so much of her Estate in Legacies; and this was done with the Consent of her intended Husband. Afterwards the Marriage took Effect; the Wife made a Writing in Form of a Will, and died. *Per Holt, Chief Justice*: This is no Will, nor ought to be proved by the Ordinary; but where a Woman is Executrix, and marries, she may make a Will with Consent of her Husband, but not without. *1 Jon. 157.* So if a Woman (having Debts due to her) marries, she may make a Will *quoad* these; and the Ordinary may prove it; in other Cases she cannot, for it is only a Writing in Form of a Will; However it appearing in the principal Case, That the Ordinary had only granted Administration *quoad* the Goods in that Writing, it was allow'd reasonable. *Stat. Rep. 313. Vid. Cro. Car. 219.*

*Of Devises to the Wife by the Baron and others,
and the Constitution of such Devises.*

*Feme cannot
devise her
Lands to her
Husband.*

A Man may devise Lands to the Wife, tho' they be but one Person in Law, because the Devise doth not take Effect till after his Death; but tho' a last Will doth not take Effect till after Death, yet if a Feme Covert be seised of Lands in Fee, she cannot devise the same to her Husband, because at the Time of the making her Will she had no Power, being *sub potestate viri*; and the Law shall intend it to be done by the Coercion of her Husband. *1 Inst. 112. b.*

*Devise by Im-
plication.*

If a Man devise Lands, whereof he is seised in Fee, to his Son and Heir after the Death of *A.* the Wife of the Devisor, this shall raise an Estate for Life to *A.* by Implication, because by this the Devisor shews his Intention, that his Heir

Heir shall not have this during the Life of his Wife; whereas had it not been for the Devise, he ought to have had it presently upon his Death. 13 H. 7. b.

But upon a Lease for Years on Condition, that he should not alien to any besides his Children, the Lessee devised Part of the Estate to H. his Son, after the Death of the Wife, and made his Executors. *Per Cur'*: This Devise to the Son, after the Death of the Wife, is not any Devise to the Wife in the mean Time; for it is plain he did not intend it to his Wife, but to his Executors in the mean Time, and so no Breach or Forfeiture. (But in the other Case none other could have it besides the Wife. *Cra. Jac. 74. Horton and Horton's Case.*) And if a Man devise a Term to the Son after the Death of the Wife of the Devisor, this shall not raise any Estate to the Wife, because it does not appear that his Intents was so; because the Son was not to have this by the Law, after the Death of the Devisor, without a Devise, but the Executor.

If a Man devise a Term to his Wife, if she for long live unmarried, and if she marry, then the Wife shall have a Rent out of the Land, and make his Wife Executrix, and die, and the Wife consent to the Legacy of the Term, and enters upon it, and after takes Husband; this Consent to the Legacy of the Term is also a Consent to the Rent when the Contingent happens. *Mich. 13 Jac. B. R. East and Hayward.*

It is settled, that a Feme Covert cannot assent to a Legacy; for if she should have Power to assent or disassent to a Legacy, then if a Term be devised to a Feme for Life, (who is also Executrix,) Remainder to J. S. if the Feme takes J. S. to Husband, yet it should be in her Power to

Consent to a Legacy of a Term.

Feme Covert cannot assent to a Legacy.

so affirm or destroy this Devise, which would be mischievous. *Sid.* 188. *Cook* and *Bellamy*.

One devised a Term to his Wife for Life, and after to his Children not provided for; and the Term was afterwards sold upon Execution for the Debt of the Wife, and after the Wife died during the Term; it was adjudg'd, that notwithstanding this Alienation, the Children of the Devisor should have the Residue of the Term. *Woodcock's Case*.

Where the Wife shall have the Goods, and not the Executors of the Husband.

The Residue of my Goods I give to F. my Wife, whom I make Executrix of this my Will, to dispose for the Health of my Soul, and to pay my Debts; and dies: She pays the Debts, and takes a second Husband, who makes his Executor, and dies possess'd of the Residue of the Goods; the Wife shall have them, and not the Executor of the Husband, if he did not make a Gift of them in his Life-time. *Dyer* 321.

1 *Andersf.* 23. *Meor* 98. *Plowd.* 343, 544, 545.

J. S. deviseth to his Wife 100 l. to be paid at such a Day; and if it is not paid then, that his Executors shall pay her 200 l. at such a Day after to come: The Wife dies before the first Day, the Executors are discharged. *Hill.* 2 *Carr* Rat. 858. *Dyer* 262. in *Margine*.

Of the Husband's devising the Estate of the Wife

If a Lease be made to Baron and Feme for Years, the Baron cannot devise the Term, because the Wife is in by Survivorship before the Devise takes Effect.

C H A P. XIX.

Rent, Reservation, Emblements.

In what Cases the Wife shall not have the Rent, though the Reservation be to her. The Husband grants a Rent out of the Wife's Term, and dies; if the Wife shall hold it discharged, and why. What Arrears of Rent the Statute of 32 H. 8. cap. 37. gives the Husband Power to recover. Feme Covert received the Rents, they not having Notice of the Coverture. Where the Husband shall be charged with the Arrears. Avowry for Rent out of the Wife's Land, how to be brought. Where the Executor of the Husband shall have the Rent, and not the Wife. Where the Wife shall have the Emblements, and where the Husband.

What shall be good to the Wife, or not.

A Possess'd of a Term for 100 Years by Deed indented, mention'd to be made between him and B. his Wife, of the one Part; but she never sealed the Deed. A. and B. assign the Term to C. yielding and paying, during the Term, to A. and B. and the Survivor of them, and to the Assigns of the Survivor of them, 10 l. Rent per Annum, upon Condition that if the Rent be not paid, it shall be lawful to him and his Wife, and the Survivor of them, and the Assigns of the Survivor of them, to re-enter, and after A. dies; neither his Administrator, nor B. the Wife, shall have the Rent, nor enter for the Condition broken; for the Wife shall not have the Rent, because she sealed not the Deed, and

R so

Rent not be reserved to a Stranger.

so the Rent cannot be reserved to her, being a Stranger; and so it is void as to her, and the Administrator of *A.* shall not have this as Assignee of *A.* during the Life of *B.* inasmuch as this was not intended as a Limitation to determine by the Death of *B.* but to be reserved to *B.* herself, and so the Assignee in Law of the Husband cannot claim it, because he did not

Solvendo.

survive the Wife; and the Word *Solvendo* cannot enure by way of Grant to the Wife, when it is by way of Reservation to the Husband.

Lessee assigns his Term, rendering Rent to him and his Wife, (she seals not the Deed) and dies; the Wife shall not have the Rent.

And the Condition in this Case runs with the Rent; and therefore the Rent being gone, the Condition is gone also; and altho' the Rent be reserved during the Term, yet the other Words (to *A.* and *B.*) restrain it. 2 Roll. Abr. 450. Cro. Car. 289. Bland and Inman. Godb. 448. And so is 2 Saund. 386. where the Husband possess'd of a Term by Indenture, to which the Wife was Party, (but she did not seal to it) assigns all his Term to the Assignee, rendering Rent to the said Baron and Feme, and the Survivor of them, and dies; neither the Wife nor the Administrator may have the Rent.

Debt for Arrears.

Rent was granted to Baron and Feme for their Lives, the Rent was arrear, the Husband dies, another Rent is arrear, the Feme dies intestate and her Administrator brought Debt for the Arrears due in the Life of the Husband and after. *Per Curiam*: It will lie, because the Arrears survived to the Wife, as well as the Rent itself. Cro. Eliz. 791. Temple's Case.

Baron grants a Rent out of the Wife's Land.

If the Husband hath a Term in the Right of his Wife, and the Husband grants a Rent out of it, and dies, the Wife shall hold it discharged, for she comes in paramount the Charge. 7 H. 6. 1. b. 9 H. 6. 5. She shall not have the Rent because she comes in paramount the Reservation;

tion; but the Executor of the Husband shall have it. *Contra Perkins, Sect. 834. 1 Inst. 46. b.*

A Man possess'd of a Term for twenty Years in the Right of his Wife, made a Lease for Years, rendring Rent to him, his Executors and Assigns, and died, the Rent is gone; but by *Montague*, the Wife in Chancery may be relieved for the Rent. *Godh. 279.*

A Feme Sole is seised of a Rent in Fee, &c. *Remedy for Arrears.* which is behind and unpaid; she taketh Husband, the Rent is behind again, the Wife dies, the Husband by the Common Law should not have the Arrears grown due before the Marriage; but the Statute of 32 H. 8. cap. 37. gives the Husband the Arrears due before the Marriage, and a double Remedy for the same by Action or Distress. *1 Inst. 162.*

Tenant in Dower makes a Lease for Years, rendring Rent, and takes Husband; the Rent was in Arrear, the Husband dies, his Executors shall have the Rent.

When a Feme Covert receives from the Lessor the Rents, the Lessees not having Notice of the Coverture, there being no Countermand of Payment to the Wife. *Per Curiam*: This Payment of Rent to the Wife is no Payment, but the Husband may well demand it, and recover it again: The Payment to the Wife is not material, for by such Pretences Feme Coverts should receive their Husbands Rents without their Authorities, which is not allowable; but this seems to be *durus sermo*; and it is an hard Case that the Tenants should refuse to pay the Lessor, and so forfeit their Bonds or Covenants, and it is a kind of Impossibility for them to divine whether she be marry'd. *Cro. Jac. 621. Sir Paul Tracy versus John Dutton.*

Payment of Rent to the Wife not good.

Where the Husband shall be charged with the Arrears.

The Husband or his Executors, (10 H. 6. 7. 4 Co. 49. and *Underwood's Case*. B. R. 1641.) shall be chargeable in Debt for the Arrearages in the Time of the Coverture on Lease made to a Woman, *dum sola fuit*. 1 Keb. 22.

Of Avowry for Rent. Vide Avowry.

Where the Husband shall be charged in Debt for Rent. Arrears.

Land is demised to a Widow, she marries, the Rent incurs during the Coverture, the Wife dies, the Husband shall be charged in Debt for the Rent. *Raym. 6. Pain and Minshall.*

If a Feme, having a Rent for Life, takes Husband, and dies, the Husband shall have the Arrearages incurred during the Coverture; but he shall not have the Arrears during the Coverture by the Common Law; yet this seems to be aided now by the Statute of 32 H. 8.

Where the Wife shall not have the Rent.

A Man possess'd of a Term for 20 Years in the Right of his Wife, makes a Lease for 10 Years, rendering Rent to him, his Executors and Assigns, and died: The Wife shall not have it, for she comes in by Title paramount; and it is but an Extract of ten out of twenty, the Remainder continuing as before, and the Executors shall have it; for the Rent shall be incident to him, who hath the Reversion under the Lessor, who is the Executor. *Poph. 145. Blaxton and Heath.*

Emblements.

Where the Wife shall have the Emblements, and where the Husband.

If Tenant in Dower sow her Land, and die before the Corn is ripe, the Corn in Conscience belongeth to her Executors, and not to him in Reversion ; but otherwise it is in Conscience of Grass or Fruits, and the Diversity in Law maketh the Diversity in Conscience.

The Tenant in Dower may devise the Corn sowed upon the Land she is endow'd of ; If the Husband sow the Land, the Property of the Corn is in the Executor, but subject to this Condition: If the Heir assign to her the Land sowed for her Dower, she shall have the Corn, for she shall be in *de optima possessione viri*, above the Title of the Executor. 2 *Inst.* 81.

If a Lease be made to Baron and Feme during the Coverture, and the Baron sows the Land, and after they are divorced *causa pracontractus*, the Baron shall have the Corn, because the Judgment is an Act of Law. 4 *Co.* 116. *Oland's Case* ; and so it is if the Divorce be at the Suit of the Husband, tho' *Popham* seemed to doubt of it.

Baron sows the Land, and then there is a Divorce.

If an Husband seised in Fee, or for Life, in the Right of his Wife, sows the Land and dies, or his Wife dies before Severance, yet he or his Executors shall have the Corn. 1 *Inst.* 55. 6.

Where the Wife shall not have them.

If Baron and Feme, Joint-tenants for Life, and the Husband sows the Land, and dies before Severance, his Executors shall have the Emblements, and not the Wife ; for there is no Diversity in this Case, and where the Husband is

seised in the Right of the Wife. *Mich. 5 Jac. Skehe and Arnoll, B.C.* but *1 Inst. 55. b.* is contra: For there it is said she shall have the Corn, and so it is said in *Cro. Eliz. p. 61.* by *Wray*, that it was so adjudg'd. *Quare Dyer 3, 6. 1 Roll's Abr. 727. Noy 149. Per Cro. Car. 515.* she shall not have it.

But by *Coke* in *Goodman and Gore's Case* *Godb. 189. Stil. 270.* Baron and Feme are Joint-tenants, the Baron sows the Land, the Wife surviving shall have the Emblements.

Where she shall have them.

If a Feme seised in Fee, or for Life, of Land, sows this, and after takes Husband, who dies before Severance, it seems the Wife shall have them, and not the Executor or Administrator of the Husband, because the Husband did not sow them.

Copyhold.

If Baron seised of Copyhold Land in Fee, sows it, and after surrenders it to the Use of a Feme, who is accordingly admitted, and after the Baron dies before Severance, the Feme shall have the Emblements, and not the Executor or Administrator of the Baron; because the Husband passes the Emblements, with the Land, to the Feme, as an Executor to the Land; and by it the Privilege, which the Law gives to him that sows, is taken away by the Surrender, and so is all one as if the Feme had sowed it, or purchased the Land sowed of a Stranger.

If the Baron sows the Land, and dies before Severance, and his Wife is endow'd of this Land so sow'd of a third Part, she shall have the Emblements, and not the Heir or Executor; for she is to have the Land, *fructus culta, vel inculta cum frugibus & redditibus.* *Bract. 2. 96.*

In Action of Trover the Question was: Feme Tenant for Life, takes the Plaintiff to Husband, the

the Remainder to another for Life, and Hops were growing out of the ancient Roots, being within the Land in Question, the Feme dies a little before the Gathering of the Hops; whether these Hops appertain to the Husband, or to him in Remainder? The Court held, they are like Emblements, which shall go to the Husband or Executor of the Tenant for Life, and not to him in Remainder; for they are such Things as grow by Manurance and Industry of the Owner, and not to be compar'd to Apples and Nuts, which grow of themselves. *Cro. Car. 515. Latham and Atwood.*

A Feme Copyholder, *durante viduitate*, sows the Land, and before Severance takes Husband; the Lord shall have it. *Cro. Eliz. 466. alias 471.*

For what Things created during the Coverture the Wife shall be charged, after the Death of the Husband, by her Agreement or Disagreement.

If Baron and Feme accept a Fine, rendring Rent, if she agree to the Estate after the Death of the Husband, she shall be charged with the Rent. *50 Ed. 3. 9. b.*

If a Lease for Years be made to Baron and Feme, rendring Rent, if after the Death of the Husband the Wife agree to the Lease, Debt lies against her for all the Arrears incurred in the Life of the Husband. *2 H. 4. 19. b.* but after the Death of the Husband she may disagree to the Lease.

If Baron and Feme join in a Feoffment of the Wife's Land, rendring Rent, the Baron dies, the Feme takes a new Husband before any Rent, the second Husband accepts the Rent, the Feoffment is affirmed for ever. *By Acceptance of Rent, a Feoffment affirmed.*

If Baron and Feme lease by Deed, and after the Husband dies, and she takes a second Husband,

band, who accept the Rents, this shall affirm the Lease against the Wife perpetually. *Dyer* 159.

If Baron and Feme join in a Lease for Life of the Land of the Wife for Years, rendring Rent, the Wife may make this good by Agreement after the Death of the Baron. 10 *H. 6.* 24. *b.* and shall have the Rent. 3 *Leon.* 271. *Butler and Baker's Case.*

Obligation.

If Obligation be made to Baron and Feme, the Wife may refuse it after the Death of the Husband. 4 *H. 6.* 6. and by such Waiver, this is made an Obligation to the Baron sole.

So it is in Exchanges and Partition, where Possession of one is waved and refused.

C H A P. XX,

Copyhold.

What Acts of the Husband shall destroy, or forfeit The Custom of the Wife's Copyhold Estate, and what not. Where she shall have her Viduity, though the Freehold be severed from the Manor, and where not Of Grant, and Surrender to and by Baron and Feme, and the Construction thereupon. Customs of Manors as to Wives or Widows, which are good, or not.

What Acts of the Husband shall destroy the Custom of the Wife's Estate, or forfeit it, or not.

THE Husband seised of a Manor in the Right of his Wife, lets a Copyhold Parcel thereof, for Years, by Indenture, and died; this shall not destroy the Custom as to the Wife, but that after the Death of her Husband, she may

may demise it by Copy as before. *Cro. El.* 459, or 475. *Conisby and Ruskey.*

The Custom of a Manor is, If any Copyholder dies seised, having a Wife at the Time of his Death, that his Wife shall have it during her Viduity; the Lord and the Copyholder enfeoff J. S. thereof, and the Copyholder dies, his Wife shall have it during her Viduity; for the Custom is continued *quoad* her, although the Freehold be severed from the Manor; for the Lord's Acts shall not prejudice the Copyholder's Estate, and it is a Privilege by the Custom fixed to the Estate, that the Wife shall have it after his Death. *Cro. Jac.* 573. *Waldoe and Bartlet.* Vid. 2 *Roll. Rep.* 178. *Mesme Case.*

Custom continued quoad the Wife, tho' the Freehold be severed from the Manor,

But the Custom of the Manor was found to be, that if the Copyholder in Fee died seised, his Wife should hold it during her Life as Free-Bench, the Lord enfeoffs the Copyholder, who died seised; she shall not have the Land; but if the Lord had enfeoffed a Stranger of the Land, yet the Land remained Copyhold, and the Custom is not taken away. *Cro. Jac.* 126. *Leshmere and Avery.*

If a Copyholder makes a Lease for Years of Lands whereof a Feme by Custom is to have her Widow's Estate, she shall not avoid the Lease, unless there be a special Custom to avoid it; for he comes under the Custom, and by the Lord's Licence, as well as the Wife. *Cro. Jac.* 36. *Farley's Case.* *Moore N^o. 147.* *Mesme Case.*

Feme that hath the Widow's Estate shall not avoid a Lease made by her Husband.

Baron, seised in the Right of his Wife of a Copyhold Land, surrenders it. *Per Walmsley,* It is a Discontinuance notwithstanding. 4 Co. *Discontinuance* 23. *Cro. Jac.* 105. *Collins and Couck.*

What

What Acts of the Husband shall forfeit the Wife's Estate, or not.

Copyholder makes a Lease for more Years than the Custom warrants, it is no Forfeiture.

Feme Copyholder takes Husband, who lets the Lands for more Years than the Custom doth warrant; It is made a *Quære* in *Head and Challoner's Case.* Cro. El. 142. whether this shall bind the Wife as a Condition in Law? But it is resolved in *Saverne and Smith's Case.* Palm. 387. and 2 Roll. 344, 372. *Mesme Case*, if Feme Copyholder of Inheritance takes Husband, the Husband makes a Lease for more Years than the Custom will bear, the Lord enters for the Forfeiture, the Husband dies, the Wife dies, the Heir of the Wife enters, and his Entry adjudged lawful, so that it is no Forfeiture.

Denial of Rent

Denial of Rent by the Husband shall be a Forfeiture against the Wife, and so Denial to do Suit of Court are present Forfeitures. If a Feme Copyholder takes Husband who commits Waste, this shall bind the Wife; and the Difference betwixt this Act, and the Husband's making a Lease is; In Waste the Forfeiture goes to the Inheritance of the Waste, which continues for ever; but in *Saverne and Smith's Case* the Forfeiture determines with the Lease. *Vide Roll. Rep. 372.*

Waste.

Diversity.

But if a Stranger without the Assent of the Husband commits Waste, this is no Forfeiture. 4 Co. 27. *Clifton and Molineux.* *Dodderidge* in *Saverne and Smith's Case*, took a Difference, where the Copyhold came to the Woman after Coverture, his Forfeiture shall not bind her; for then it cannot be said it was her Folly to take an Husband that would forfeit,
as

as it might if she had the Copyhold before Marriage. *Palm.* 387.

Vide Hobart 181. *Howard* and *Bartlet*. Where the Severance of the Customary Tenants from the Manor, shall not prejudice the Widow in her customary Estate. It is not in the Power of the Lords to destroy Widows Estates. By the Severance, Incidents to the Tenancy are not destroyed, but Incidents to the Seigniorie are.

The Custom is, that a Woman shall hold *durante Viduitate*; she shall make a Lease before Admittance; for in that Case there is no Fine due to the Lord, and the Law vests the Estate in her. *Noy* 22. *Remington* and *Cole*. *Hob.* 181.

Surrenders, Grants, and the Construction.

The Husband takes Copyhold Lands of the Lord *cui donor concessit seisinam, Habendum* to Baron and Feme; this is a good Grant to the Wife, though she be named after the *Habendum*, and the Wife by these Words takes a present Estate with the Baron, which she cannot do by Common Law Conveyance. *1 Saund.* 151.

The Wife is named after the Habendum, the Grant is good.

A Copyholder in Fee (where the Custom was for a Widow's Estate) made a Lease by Licence, Reserving Rent to him and his Wife during their Lives, (and did not say, and either of them.) *Per Curiam*: The Wife may have this Rent, though no Party to the Lease, and it shall continue for the Life of either of them. *Hill's Case*, cited *1 Vent.* 163.

Where Wife shall have the Rent, though no Party to the Lease.

The Husband seised in Right of his Wife, cannot grant Copies in his own Name, but ought to join the Wife with him. *Cro. Jac.* 99. in *Spieland* and *Royden's Case*.

The Wife to join with the Husband in Grant of Copies.

Husband

Husband seised in Right of his Wife of Copyhold Land, surrenders it. *Walmsly* held this a Discontinuance, notwithstanding 4 *Rep.* 23. *Ideo Quare*; for I conceive it makes no Discontinuance; and Co. 4 *Rep.* 23. is good Law. *Vid. Lex Cust.* 178.

Customs of Manors as to Wives, Widows; what are good, and what not.

That the Wife, of a Copyholder for Life shall hold it *durante viduitate*, was agreed to be a good Custom; and so the Custom of *Taunton-Dean*, That if a Copyholder in Fee marries a Wife, if the Wife survives, she shall have the Fee, & *sic e converso* agreed to be good. *Noy p. 2.*

There can be no Dower nor Tenancy by the Courtesy of a Copyhold, without special Custom. 1 *Anders.* 292. It was admitted by the Court to be a good Custom, That an Executor or Administrator shall have a Year in the Land of the Copyholder against the Wife that claims her Free Bench. *Noy 29. Remington and Cole.*

The Custom of a Manor was, That a Woman *cooperta viro poterit devisare* her Copyhold Land to her Husband, or any other by the Assent of her Husband. *Per Curiam*: The Custom is not unreasonable; but because it was *poterit devisare*, which is a Word of Justification, and it should have been *usi sunt devisare*, by Way of Excuse, it was adjudged against the Plaintiff. *Moor N^o. 268. 3 Leon. 81. Skipwith's Case.*

If a Man marry a Widow, it is a good Custom that she shall not have Dower. *Kitchen*

149. *Dalt.* 30. *b.* but such a Custom of the Wife of Tenant in Fee, is not good.

But Custom for the Wife to have the Moiety as Survivor, is good; and if any Lease be made, she shall have a Moiety of the Rent. 1 *Keb.*

357.

The Wife that is endowable of the Moiety of Gavelkind Land, may not wave it, and have the third Part. *Moor* 260.

If a Copyholder for Life, where by the Custom there is a Widow's Estate, agrees that J. S. shall hold and enjoy it during his Life, and the Widowhood of such Woman as he should leave at his Death, and enters into a Bond for that Purpose; yet the Widow shall not be bound by that Agreement. Decreed *Pasch.* 1688. between *Musgrave* and *Dashwood*, 2 *Vern.* 63.

The Widow of *Cestui que* Trust of a Copyhold Estate ought to have her Free Bench, as well as if the Husband had the legal Estate in him. 2 *Vern.* 585: *per Curiam.*

C H A P. XXI.

Vide Will.

Of the Wife's separate Disposition. Where the Money which the W dispose of, to whom Maintenance on a ings. Where Detai Breach of the Condi of Separation betwe for allowing yearly ings thereupon.

Condition to pay 50 l. to J. S. and the Wife is to dispose of the 50 l. yet it must be paid to J. S.

CONDITION of a Bond was to pay 50 L. to the Plaintiff. *Memorandum*, It is agreed before sealing, &c. that the Wife may dispose of the 50 L. to whom she will in her Life-time to be paid by the Plaintiff accordingly, he being only Trustee of the Wife in the said Obligation. Defendant pleads, That the Wife of the Defendant with his Consent made her Will, and by it bequeathed 30 L. of the said 50 L. to diverse Persons, and the rest to her Husband the Defendant, and made him Executor, and afterwards dies, and so she disposed of the said 50 L. in her Life: In Debt on this Bond, and on Demurrer on this Plea, Judgment was given for the Plaintiff; for the 50 L. ought to be paid to the Plaintiff, notwithstanding the Disposal. *Sir Thomas Jones, p. 216. Blunt and Collins, otherwise in Equity. See Chap. IX.*

Covenant to pay to the Defendant's Wife or such as she appoints, 50 l. per Annum as a separate Maintenance, provided she live at such a Place as N. and W. appoint. Defendant pleads

pleads, she did not live at such a Place as N. and W. appointed. The Plaintiff replies, she was ready to live at such a Place, but that N. and W. appointed no Place. To which the Defendant demurred as being a Condition precedent; but the Plaintiff insisted it was a Condition subsequent, and so became impossible, one being since dead, and no Place appointed. *Per Curiam*: The Defendant should say she lived at such a Place, and that no other was appointed; for this is a Condition subsequent, the Covenant being in Pursuance of a former absolute Agreement to pay so much; and it's like the Assent of the Husband, which is intended till the contrary appears. 3 Keb. 363.

Condition subsequent, and not precedent.

Leeds and Beera.

Bond conditioned, That whereas the Defendant should marry such a Widow who was possessed of divers Goods of her first Husband, and the Goods of his Children, that her Husband should not meddle with them; but that she and her Children might enjoy them without Disturbance or Interruption of the Defendant. The Defendant Pleads Performance. The Plaintiff assigns for Breach, that the first Husband was possessed of such Shop and Goods, and that the Wife had them before Marriage; and that such a Day after the Marriage, the Defendant her new Husband took the said Goods into his Hands, and them detains. Verdict *pro Quer.* And moved in Arrest of Judgment, that here is no sufficient Breach alledged, because he doth not shew that the Husband made any Act or Disturbance; for by the Intermarriage the Goods are in the Husband, and it is not shewed that he disturbed the Wife to enjoy them. But *per Curiam*: The Breach is well assigned; for it is said he detained them from the

Condition not to meddle with the Goods of the first Husband; Detainer of them is a Breach.

the Wife, especially being after a Verdict. *Cre. Car. 204. Crowle and Dawson.*

*The Wife
saves Money
by her Fruga-
lity.*

The Wife of an Improvident Husband had, unknown to him, by her Frugality, raised some Monies for the good of their Children, which she had disposed of for that Purpose, being no otherwise provided for; this Disposition of the Wife the Lord Chancellor established by Decree; but afterwards upon Review and Assistance by the Judges, this Decree was reversed, as being dangerous to give a Feme Power to dispose of her Husband's Estate: This was *Scot and Brograve's Case, Anno 1639.* but in *George's and Chancey's Case* a Disposition by a Feme Covert of Money raised out of separate Maintenance, is good against the Husband. *Vide supra, and Chap. IX.*

*Wife purloin-
ing Husband's
Goods or Mo-
ney.*

A Feme Covert purloined her Husband's Goods or Money, and put the Money into other Men's Hands, who buy Lands to her Use therewith; if the Heir or Executor of the Husband do sue in Equity for Relief; and to have the Land or Money restored, yet denied Relief; for *Egerton* Chancellor said, he would not relieve Heir or Executor, (no not the Husband himself if he were alive); for he sat not there to relieve Fools or Buzzards who would not keep their Monies from their Wives. The other Chancellors have been of another Opinion, and with great Reason.

An 100 *l.* was lent by the Lord *Holles's* Lady, and in the Note which was first given for it, it was written that the Money should be disposed as the Lady *Holles* should direct. An Action at Law for this Money being brought, it was barred by the Statute of Limitations; a Bill was exhibited for Relief, and the Statute of Limitations insisted upon; but in Regard the

Money

Money was look'd upon as a *Depositum*, and a Trust thereupon. for the Lady, a Decree was obtained for the Money. 2 *Ventr.* 345. Lord *Holles's Case*.

Bond was given before Marriage, that the Wife should dispose of 500 *l.* which she did, and decreed good, notwithstanding the Bond was cancelled by the Consent of the Wife: But upon the releasing the said Bond, the Husband gave a Note in Writing, that she should dispose of it, so as first he might be made acquainted with it; and so the Husband would have avoided the Note, pretending he was not acquainted with it; supposing those Words to be a Condition; but the first Decree was confirmed. 1 *Rep. in Chancery* 118. *Palmer's Case*.

Separate Maintenance.

A Feme Covert may sue without her Husband for her separate Maintenance, and the Demurrer was over-ruled. *Cases* 35. *Reynes and Lewes*.

Baron and Feme by Agreement separated and lived apart, and it was agreed the Wife should have 150 *l.* per Annum separate Maintenance; and out of which she had saved some Monies, and put it out to Interest, and took Bonds in a Friend's Name, and disposed the Money by Will; and this was in Chancery established a good Disposition. *Lady Prudgeon's Case*, *Cases* 118.

In Covenant: The Defendant covenanted with the Plaintiff, That S. (Wife of the Defendant) should be permitted to live separate from the Defendant until the Defendant and the said S. by Writing under their several Hands, attested by two Witnesses, should give Notice to each other that they would cohabit: And further,
S that

Money saved by the Wife out of her Separate Maintenance disposed by her.

that he the Defendant, during the Coverture, and until such Notice be given of their Desires to cohabit as aforesaid, would pay to the Plaintiff for the Maintenance of the said S. 300 *l. per Annum* at four quarterly Payments; and sets forth, that the said S. from the Date of the Indenture of the Covenants, to the Time of the said Suit, did live separate from the Defendant, and no Notice of Cohabitation as aforesaid had been given during that Time of either Side, and for 75 *l.* for one Quarter's Payment, being alive.

Defendant pleads in Bar, That after the Indenture aforesaid, and before the Action, another Indenture was made between the Defendant and S. his Wife of one Part, and the Plaintiff of the other, reciting the first Indenture; and further reciting, That the Defendant and S. did intend to cohabit, and did so at that Time, and expressing that it was the true Intent and Meaning of all the said Parties to the said Indenture produced, *ut supra*, that so long as the Defendant and S. should agree to cohabit, the said annual Payment should cease: And the Plaintiff did by the last Indenture covenant, that so long as they cohabited, that the Defendant should be saved harmless from the 300 *l. per Annum* Payment. The Plaintiff replies, They did not cohabit *modo & forma prout*. The Defendant demurs. Judgment *pro quer'*; for unless the Cohabitation had been according to the first Indenture, as by Writing mutually subscribed, and attested by two Witnesses, &c. it was no Bar; for the last Deed had not taken away the Effect of the former, and a latter Covenant cannot be pleaded in Bar of a former: But the Defendant must bring this Action on the last Indenture if he will help himself. 2 *Vent.* 217. *Gawden and Draper.*

A Husband turns away his Wife, or uses her with Cruelty; by which Means she is obliged to leave him, Chancery will upon her own, or *Prochein Amy's* Application, decree her a separate Maintenance, suitable to her Degree and Quality, the Fortune she brought and her Husband's Circumstances. *Cary* 124. 1 *Chanc. Rep.* 4. *S. P.* 1 *Chanc. Rep.* 164.

If Husband and Wife agree to live separate, and that the Wife shall have so much a Year, such Agreement will be decreed in Equity. *Nel. Chanc. Rep.* 73.

There is a Decree for a separate Maintenance, and the Husband offers to be reconciled, and the Wife refuses, though the Court will suspend the Payment of the Money, yet it will order all the Arrears to be brought into Court; and, according as there is Necessity, vacate the Decree, or give the Wife, upon ill Usage, Liberty to resort to and have the Benefit of it. *26 Car. 2.* 1 *Chanc. Ca.* 250.

A Feme Covert, who had by her Husband's Consent 50 *l. per Annum* settled on her, and who had, upon a Sentence in the Spiritual Court, obtained a Decree for 50 *l. per Annum* more for Alimony, suggests by her Bill, that her Husband had, on Purpose to defraud her, procured the Tenants to surrender their Estates, on which the said Rents were reserved; and prayed that it might be made good to her by the Decree of this Court; but it appearing that she was a very lewd Woman, and eloped, and her Husband offering in his Answer to take her again, my Lord Chancellor would make no other Order in it, but that the Husband should stand in the Place of the Tenants, and admit the Rent payable, and she to recover

it at Law as well as she could. *Pasch.* 1682. between *Mildmay* and *Mildmay*, 1 *Vern.* 53.

The Husband and Wife agree to part, and the Wife's Father agrees, upon the Husband's giving him a Note to pay back the Wife's Portion, to save him harmless from any Debts his Wife may contract, and against all Demands for her Maintenance. The Wife, with her Child, went thereupon, and lived with the Plaintiff her Father, and were maintained by him; and he now brought his Bill to have the Portion paid, which was decreed, on his giving Security to indemnify the Defendant against the Debts and Maintenance of the Wife and Child; although the Husband now offered to take his Wife home, and maintain her and her Child, and to allow the Plaintiff for the Time past. *Mich.* 1700. 2 *Vern.* 386.

By Marriage Articles 6000 Pounds, Part of the Wife's Portion, is agreed to be invested in Land, and settled in Trust for the Husband for Life, then to his Wife for Life, Remainder as a Provision for younger Children, Remainder to the Wife in Fee; and the Husband by his Cruelty forces his Wife to live separate from him; the Court will decree the Interest of 6000 *l.* to be paid the Wife for her separate Maintenance, till Cohabitation, there being no Issue, the Money lying dead, and it being a Trust which is properly to be directed by this Court. *Pasch.* 1705. 2 *Vern.* 493.

A Wife having been used with Cruelty by her Husband, becomes intitled to 3000 *l.* as her Share of her Mother's Personal Estate, who died intestate; and it was decreed, that the Wife should have the Interest of it for her separate Use, and then to the Husband, if he survived;

survived; and afterwards the Principal to be paid the Issue; and if no Issue, then to the Survivor of the Husband or Wife. *Pasch.* 1711. between *Nicholls* and *Danvers*, 2 *Vern.* 671.

Memorandum, the Husband had given a Note to his Wife, that if he should again use her ill, she should have her Share of her Mother's Estate to her own Use. *Vide* 2 *Vern.* 752. a separate Maintenance decreed a Wife.

A Bill was brought to subject the Defendant's Jointure to the Payment of her Debts, which she contracted whilst she had a separate Maintenance from her Husband; *per* Lord Chancellor, Had the separate Maintenance continued, there would have been some Reason to follow that, and make it liable; but that being at an End, there is no Reason that the Jointure should be liable; and the Bill was dismissed; and the rather because the Executor of the Husband, who might have paid the Money, was not made a Party. *Pasch.* 1685. 1 *Vern.* 326.

C H A P. XXII.

What amounts to a Disposition of the Wife's Term by the Husband, to vest the Interest in him, his Executors and Administrators. What Condition in Mortgages shall survive to the Husband or not. If the Mortgage of the Wife's Term doth amount to a Disposition in Law. Diversity between a Feoffment, and Bargain and Sale, as to the Extinguishment of the Term of the Wife. Of the Forfeiture of the Wife's Term by the Outlawry or Attainder of the Husband, or on Extent. If Recovery by the Husband in Ejectment alters the Term. If Payment of Debts of the first Intestate, vests a Term in him. What Trusts for the Wife the Husband may dispose of, or not. What shall amount to a Forfeiture of the Wife's Term.

What amounts to a Disposition of the Wife's Term by the Husband, to vest the Interest in him, his Executors or Administrators.

What Power the Husband hath of the Wife's Term.

THE Baron by the Intermarriage hath full Power over the Wife's Term to alien it; and if the Wife dies, the Term survives to the Husband; and if the Husband dies, it survives to the Wife unless he dispose it: But the Husband can make no Disposition of it by his last Will. *Plow. 416. Bransby and Grantham; and so is 2 H. 4. 7. b. 1 Roll. Abr. 344. Pop. 5.* where a Man possessed of a Term for Years in the Right of his Wife made a Lease for Years of the same Land, to begin after his Death, and afterwards he died, and the Wife survived him;

him; the Question was, If the Wife shall have this, or the Lessee? And *per Curiam*, The Lessee shall have it; for as the Husband, during his Life might contract for the Land for the whole Term which the Wife had in it; so might he do for any Part of the Term at his Pleasure; for if he may demise the Land for 21 Years, to begin presently, he may make it also to begin at any Time to come after his Death, if the Term of the Wife be not expired; but for the Remainder of the Term, if the Wife maketh no Disposition during his Life, the Husband shall have it: But in this Case, if the Husband devise this Land to a Stranger, yet the Wife shall have it, and not the Devisee, as it happened in the Case of *Mathew Smith*, because that by the Death of the Husband (before which the Devise cannot take effect) the Wife had it in her first Right not altered by the Death of the Husband.

The Husband can make no Disposition of it by his last Will.

So it is where Baron and Feme are Joint-tenants during the Coverture for 60 Years; the Husband by Indenture lets all the Land for 70 Years to commence immediately after his Death, the Husband died and the Wife survived; the Question was, If this were a good Lease to charge the Possession of the Wife? And *Per Curiam*, 1. It is a good Lease, for here is a good Term created in Interest, although not in Possession; and it is not like a Case where nothing passeth till his Death: 2. The Husband having an Interest, to dispose in his Life-time, he might dispose all the Term, and it should bind the Wife; so when he hath disposed by an Act executed in his Life-time of the Interest of the Term, and hath created a Term

Term in Interest, tho' not in Possession.

in Interest, this is as good as if he had granted all the Term. *Cro. Eliz.* 287. 1 Co. 155. *Moor* 329. *Grant and Locroft.*

L. possess'd of a Term for 18 Years, and of another Term in Reversion of the same Land for forty Years, died intestate: His Wife takes Administration, and enters and marries *J. S.* who let it to *J. D.* for 21 Years, rendering Rent, and makes his Executor, and dies. *Per Curiam*: During the first Term for Years the Executor shall have it; for the Husband had given away all that Term; but for the Residue of the Term of 21 Years, which is derived out of the Term of 40 Years, the Wife shall have it as annexed to the Reversion or Term which the Wife had. *Cro. EL* 278. *Lof-tus's Case.*

Disposition of Part of the Term, no Disposition of the Whole.

If a Man be possess'd of a Term of 40 Years in the Right of his Wife, and makes a Lease for 20 Years, reserving Rent, and dies, the Wife shall have the Residue of the Term, but the Executors of the Husband shall have the Rent; for it was not incident to the Reversion, for that the Wife was not Party to the Lease: So note; A Disposition of Part of the Term is no Disposition of the Whole. 1 *Inst.* 46. b.

But *Blackstone* and *Heath's Case* is; A Man possessed of a Term for 20 Years in the Right of the Wife, makes a Lease for 10 Years, rendering Rent to him, his Executors and Assigns, and died: The first Question was, If the Executors or the Wife shall have the Rent? By *Houghton* and *Crook*, the Rent is gone, against *Mountague*, who held the Wife should have it; but it was agreed that the Executors of the Husband shall not have it: And if the Husband after the Lease made had granted over the Reversion, the Grantee should not have it:

But

But by *Montague* in that Case, in Chancery the Wife may be relieved for the Rent. *Godb.* 279. *Pl.* 396. *Pop.* 145.

In Cases of Possibilities, the Law doth not vest them in the Husband: As if a Feme Sole be possessed of a Chattel Real, and be thereof dispossessed, and then takes Husband, and the Wife dies, and the Baron survives, this Right is not given to the Baron by the Intermarriage; but the Executors or Administrators of the Wife shall have it; so it is if the Wife have but a Possibility, as if the Husband, possess'd of a Term in the Right of his Wife, grants this to J. S. if he shall so long live, and dies, the Wife shall have this Possibility of Reversion, if J. S. dies within the Term, and not the Executors of the Husband. *1 Inst.* 351. *1 Roll. Abr.* 345. So if a Lease be made to Baron and Feme for Term of their Lives, the Remainder to the Executors of the Survivor of them, the Husband grants away this Term, and dies; this shall not bar the Wife, for that the Wife had but a Possibility, and no Interest. *1 Inst.* 468.

Baron and Feme mortgage their Interest in the Wife's Term, and before the Day of Payment the Wife died, and the Husband paid the Money at the Day, in Redemption of the Mortgage, and enter'd and took another Wife, and made her Executrix, who enter'd. R. took Administration to the Goods of the first Wife, and enter'd upon the Lessee, upon whom the second Wife enter'd, and made the Lease to the Plaintiff; and Judgment was given for the Plaintiff, because that though the Lease was at first the Wife's, and that the Husband was possess'd in her Right; so as tho' he had purchased the Fee-simple, the Lease had not been extinct, yet by the Intermarriage he had full Power

Possibilities not vested in the Husband.

Baron and Feme join in a Mortgage of the Wife's Term; the Feme dies, the Condition shall survive to the Husband.

Power to alien it; and if he survive the Wife, he is to enjoy it against her Executors and Administrators: So here when he survives, the Condition survives to him, and restores the Lease to him in State, as it should have been if it had been aliened. *Hob. 3. Young and Radford. 1 Roll. Abr. 344. the same Case.*

It is said in *Roll. Abr. 344.* If a Feme, possess'd of a Term, take Husband, and they grant the Term upon Condition, and re-enter for the Condition broken, the Wife shall have the Term again: And the Case of *Radford and Young* is there cited to be adjudg'd contrary to *Hobart*; which was, if a Woman possess of a Term take Husband, and they grant the Term upon Condition, if their Executors or Administrators pay 10*l.* to re-enter, and after the Husband pays the 10*l.* this is not any Disposition, but they shall be possessed in the Right of the Wife; for altho' he pay the Monies to redeem it, yet perhaps he received the Money when it was mortgaged.

If a Husband possess'd of a Term in Right of his Wife grant this over upon Condition, that the Grantee shall pay 10*l.* to his Executors, the Husband dies, the Condition is broken; the Executors of the Husband enter, the Wife shall not have the Term, for this was a Disposition of the Term; all the Interest being granted over. *1 Inst. 46. b.*

If Husband possess of a Term in Right of the Wife, grants this to J. S. if he shall so long live, and dies, the Wife shall have this, *causa qua supra.*

If a Husband grant the Land which he had in Lease in the Right of his Wife, except Part, the Wife shall have this Part so excepted, for it is not disposed of. *Dyer 264.*

Lessee

Lessee for Years assigns his Term to the Wife of the Lessor and a Stranger, and after the Lessee bargains and sells the Land for Money by Deed inrolled, and dies; the Stranger dies, and the Wife claims to have the Residue of the Term not expired. Now in *Bracebridge's Case*, *Plowd.* where the Husband in such Case made a Feoffment, it was adjudged, that by the Livery he had extinguished, and given over the Term of the Wife: But some make a Diversity where the Husband makes a Feoffment, and where a Bargain and Sale, because by it nothing passeth but the Use; and after the Statute of 27 H. 8. the Possession is convey'd in such a Manner as the Use, and by the Grant of the Use, the Lease *in jure uxoris* passeth not. *Moor* 171.

Extinguishment of the Term of the Wife.

If a Term for Years in the Right of the Wife be extended for the Debt of the Baron, this shall bind the Wife. 7 H. 6. 26. But the Wife shall have the Residue after the Extent incurred.

Extent of the Wife's Term.

If the Baron grant the Herb or Vesture of the Land, which he held with his Wife for Years, and dies, the Grantee shall have the Grass or Vesture. 7 H. 6. 52.

If Baron and Feme be ejected out of the Term in Right of the Wife, and the Baron recovers in Ejectment brought by him in his own Name only, this is an Alteration of the Term, and vests in the Husband only. 1 Inst. 46. b.

Recovery in Ejectment Firm is a Disposition.

Upon Execution against the Husband for his Debt, the Sheriff may sell the Term during his Life.

Term of the Wife sold by the Sheriff.

Term for Years in Right of the Wife, if the Husband be outlawed or attainted, they are Gifts in Law. 1 Inst. 351.

If Baron be outlawed or attainted.

Though the Husband be posselt of the Term in her Right, yet he hath Power to dispose thereof by Grant or Demise; and if he be outlawed or attainted, they are Gifts in Law. 1 *Inst.* 251.

Two Femes Joint-tenants, one takes Husband and dies, the Term shall survive.

Two Femes, Joint-tenants of a Lease for Years, one of them takes Husband, and dies; yet the Term shall survive; for though all Chattels real are given to the Husband if he survive, yet the Survivor between the Joint-tenants is the elder Title, and after the Marriage the Wife continued sole possessed; for if the Husband die, the Feme shall have it, and not the Executors of the Husband; *aliter* of personal Goods. 1 *Inst.* 185. b.

What Trusts of the Wife the Husband shall dispose, or not. See Ch. IX. versus Finem.

What Trust of the Wife the Husband may dispose, or not.

If Husband, being posselt of a Term for Years, grant this over in Trust, for the Benefit of the Wife; he may afterwards dispose and forfeit this Trust, and bar the Wife, p. 8. *Jac. in Scac. Wyke's Case*; for he had as great a Power of the Use, which he had in the Right of his Wife, as he had of a Term in the Right of his Wife; but if he make a Lease for Years to another for the Use of the Wife, if she so long live for her Jointure, the Husband may not dispose the Trust, *Mesme Case*, and so for the Benefit of the Wife and Children.

If a Lease be made by the Father to P. A. in Trust for the Advancement of his Daughter, who marry'd with him, the Husband may clearly dispose of this Term, and no Remedy at Common Law for it. 1 *Bulst.* 118. *Plat and Sleep.*

If

If a Term for Years be granted to the Use of a Feme Sole, and she takes Husband, and dies, the Administrator of the Wife shall have the Use, and not the Husband; because this Trust of the Wife was a Thing in Privy, and in Nature of an Action, for which there is no Remedy but by Writ of *Subpœna*; for the Trust runneth in Privy in this Case, and the Husband shall not be Tenant by the Couteys of an Use.

A Woman conveys a Lease in Trust for her Use, and after marries; in such Case it lies not in the Power of the Husband to dispose of it; and if the Wife die, the Husband shall not have it, but the Executor of the Wife. *March. Rep.* 45. Sir *John St. John's Case*, so ruled at Common Law; and in *Wytham and Waterhouse's Case*, a Lease for Years was granted to the Defendant to the Use of the Grantor's Sister, whom he afterwards should marry; who married her accordingly, and then died: The Feme takes the Plaintiff to Husband, and afterwards she died; and the Defendant takes Administration of the Plaintiff's Wife's Goods, and the Plaintiff sued the Defendant in Chancery to have the Term; and it was decreed by the Advice of the Judges of *England*, that neither the Term, nor the Use thereof appertained to the Husband. *Cro. Eliz.* 466. And it was resolv'd in Chancery, That the Husband cannot grant or charge the Term of the Wife in Trust, *Cases* 225. as the Wife having assigned her Term in Trust for herself before Marriage, and the Husband, without joining with the Trustees, does mortgage the Trust; and the Husband being dead, the Mortgagee exhibits his Bill to have the Lands conveyed to him, or that they should redeem, and the Court dismiss the Plaintiff's Bill;

The Husband cannot grant or charge the Term of the Wife in Trust. But see below, Ch. IX. versus Finem.

*Not forfeit it
for Outlawry
or Felony.*

Bill; for since Queen Elizabeth's Time it has been the constant Course of this Court to set aside all Incumbrances and Acts of the Husband upon the Trust in the Wife's Term; and that he shall neither charge or grant it any way neither shall he forfeit it by outlawry, or Felony, if it be for Jointure.

A Widow makes a Deed of Settlement of her Estate, and marries a second Husband, who was not privy to such Settlement; and it appearing to the Court, that it was in Confidence of her having such Estate, that the Husband married her, the Court set aside the Deed as fraudulent: Between *Howard* and *Hooker*, 2 *Chanc. Rep.* 81.

So where the intended Wife, the Day before her Marriage, entred privately into a Recognizance to her Brother; it was Decreed to be delivered up. 2 *Chanc. Rep.* 79.

So where a Conveyance was made by the Wife, before her Marriage, to Trustees, in Trust, that they should permit her to receive the Rents and Profits of the Estate, and Act in every Thing as she, whether Sole or Covert, should appoint; the Lady being crazed in her Understanding, endeavoured to run away from her Husband, and stirred up her Creditors to sue him; and the Conveyance appearing to be without the Husband's Privy, my Lord Chancellor held it to be in Derogation of the Rights of Marriage, and decreed the Possession of the Estate to the Husband, and a Conveyance from the Trustees to the Six Clerks, that it might be subject to the Order of the Court. *Hill.* 1686. 2 *Vern.* 17.

A Woman, on Agreement before Marriage with her Husband, being to have a Power to act as a Feme sole; and the Husband dying,
and

and she marrying again, the second Husband not being privy to the Settlement on the first Marriage, it was decreed, that the second Husband should not be bound by that Settlement made on the former Marriage. 2 *Vern.* 17.

But where a Widow, before a Marriage with a second Husband, assigned over the greatest Part of her Estate to Trustees, in Trust for Children by her former Husband, though it was insisted that this was without the Privy of the Husband, and done with a Design to cheat him; yet the Court thought that a Widow may provide for her Children, before she put her self under the Power of a Husband; and it being proved that 8000 *l.* was thus settled, and that the Husband had suppressed the Deed, he was decreed to pay the whole Money, without directing any Account. *Mich.* 1689. 1 *Vern.* 408.

A Trust was for raising of Money for a Feme sole, in Case she did not marry contrary to the Liking of Sir *Ed. W.* and his Lady; and if she did, then to such Persons as the said Sir *Edward* and his Lady, or the Survivor of them, should nominate; and for Want of such Nomination, then to Sir *Edward* and his Lady; and Sir *Edward* and his Lady were Lessees in Trust. The Feme sole married without their Consent, Sir *Edward* died without any Appointment, and so did his Lady. The Court was of Opinion, that it was not in the Power of Sir *Edward* and his Lady to have disposed of this Lease, otherwise than for the Benefit of the Feme sole, if she had lived; and her Administratrix was well intitled to the Benefit of this Lease. *Cases* 58. *Fleming* and *Walgrave*.

Annuity purchased in Trust for the Wife, yet the Arrears decreed to the Husband.

A Trust was, That one *A.* should purchase in his own Name an Annuity of 80 *l.* per Ann. for the Life of the Plaintiff's Wife, and pay the same to her and her Assigns, and the Bill in Chancery was to force the Payment of this Annuity to the Plaintiff, who lived separate from his Wife: It was decreed, That the Husband being Assignee of the Wife, and that there being no Negative Words by the Will to exclude the Husband from the Annuity, he could not exclude him; and so decreed the Defendant to pay all the Arrears and the growing Annuity to the Plaintiff's Husband. *Cases 194. Dakins and Beresford.*

Diversity between a Lease for Life and a Lease for Years.

Note a Diversity between a Lease for Life and a Lease for Years made to a Feme Covert, for if I let Land to a Feme sole for Term of Years, who taketh Husband, and after I confirm the Estate of the Husband and his Wife, to have and to hold the Land for Term of their two Lives; in this Case they have a Joint Estate in the Freehold of the Land, for that the Wife had no Freehold before; but her Estate of Freehold cannot be altered by the Confirmation made to her Husband and her, as the Term for Years may, whereof her Husband may make Disposition at his Pleasure; and this Confirmation makes them Joint-tenants for Life, because a Chattel of a Feme Covert may be drowned. *1 Inst. 300. a.*

Term vests in the Husband by Payment of Debts.

Executor *de son Tort* dies intestate, his Mother administers, and after takes Husband, (there being, amongst the Chattels of the Wife as Executor *de son Tort*, a Term for Years,) the Husband pays so much of the Debts of the first Intestate as the Term for Years is worth. *Per Curiam*, The Term for Years is vested in the Husband. *Sid. p. 76. Baker and Beresford.*

If an Inheritrix carves out a Term for 1000 Years to Trustees, and she and her intended Husband declare the Trust to be for the Husband for Life, and after his Death for the Wife and her Heirs, and afterwards the Husband and Wife by Fine *sur concessit* grant a Term of twenty-one Years, reserving the Rent to the Husband and Wife and the Heirs of the Wife, yet the Administrator of the Wife shall not have the Benefit of the Rent reserved. 2 Vern. 62.

What shall amount to a Forfeiture of the Wife's Term, or not.

Lease for Years is made to Bar^{on} and Feme, provided that if the same Land shall come into other Hands, than to Baron and Feme, and their Issue, that the Lord upon Tender of 100*l.* may enter. By *Dyer* and *Brook*; His Entry is lawful, for it is the Act of the Wife: *Weston* By Marriage cont', for it is an Act in Law, and the Husband of an Husband is poss^{ess} in *jure Uxoris*; *aliter* if the Wife had who aliens. been dead. The principal Case in *Dyer* was; The Lessee covenants that if he, his Executors or Assigns, alien the Term, then the Lessor to enter. Lessee makes his Wife Executrix, and dies; the Wife takes Husband, the Husband aliens the Term; and it is debated there whether the Lessor may enter. *Baldwin*; The Condition is not broken, because the Husband's Estate is made by Law, and cannot be said Assignee, and so like a Tenant by the Courtesy: But by *Brown* and *Shelley*, An Assignment in Law is as strong as an Assignment in *Fait*; and by the Espousals the Term vests in the Husband, as if it had been a Gift by the Wife: And it was adjudged it was a Forfeiture. *Dyer* 6. b. 7. a.

C H A P. XXIII.

What Acts done, or Contracts made by the Wife, shall bind the Husband, or not. Six Resolutions of the Court in Scott and Manby's Case, as to that Point, and other Cases relating thereto, and the Manner of laying the Action, and declaring therein.

Regularly the Contracts of Femmes Covert are void, in as much as their Powers are transferred to their Husbands by the Inter-marriage. *Sid.* 100. Yet in 11 *H.* 6. 30. it is the Opinion of *Martin*, that if a Woman buy Things suitable to the Degree of her Husband, he shall be bound by it; so 27 *H.* 8. 25. 67. *Brook*, If the Things come to the Use of the Husband, he shall be charged by the Contract of the Wife. *Sid.* 114. 2 *Cr. Car.* 258. And yet *Hutton*, *Rep.* 106. *Bill* and *Lully's Case*, The Baron shall not be charged by the Contract of the Wife. *Sid.* 123. *Dyer* 323. It is said in 1 *Roll. Abr.* 351. If a Wife buy Things for her necessary Apparel without the Assent of the Husband, yet the Husband shall be bound to pay it, *Sir Thomas Gardener's Case*. But these seeming Diversities will be reconciled by reading the following Argument of Lord *Hale*, in the Case of *Scott* and *Manby*, which opens the Law on this Head better than fifty scatter'd Cases.

A Woman departs from her Husband without his Consent, and during her Absence, the Husband prohibits several Persons, and amongst the Rest *J. S.* to trust her, and after she makes a Request to cohabit again with her Husband and he refuses to receive her, and yet *J. S.* self

sells to her Silk and Velvet to the Value of 40 l. which is found Suitable to the Degree of her Husband, the Husband shall not be charged. Lord Hale.

I. I will say something of the Nature of Contracts.

II. I will apply it to our Case, in Consideration of the Verdict, as it is found.

III. I will shew it in what Particulars we all agree, and where we differ, and so state the Question.

IV. I will speak to the Question as it shall be so stated.

1. A Contract is the Consent of two or more; whereby to bring in an Obligation of one to the other; and the Parts requisite to such a Contract, are 1st, Parties. 2dly, Consent. 3dly, An Obligation.

1st, It is requisite that the Parties be not disabled to Contract; and as to that, in Law some are disabled to Contract *quoad hoc*, and *ex parte*; as an Infant, *non compos*, &c. and some have an absolute Disability; as a Feme Covert, who can no Way in our Law contract.

2dly, As to the Consent, that must be either express or implied; express must be either Precedent, Concomitant, or Subsequent; implied is raised by Law; as where a Man is made Bailiff, Steward, or House-keeper, a general Authority is given him. When Goods come to a Man's Use, he having had Notice of the Contract, it is an Assent the Law will imply, and make the Contract oblige him; and if either of these had been found in this special Verdict, it had been well; for then there had been Fact enough for the Law to have made Construction

upon. There is, besides all this, Evidence of a Consent in Fact, which must induce a Jury, if there be no Circumstances against it. As if I send a Servant always with ready Money, and he buys upon Trust, here is no Evidence; but if I usually send him upon Trust, and where he takes up Goods, I stand to his Bargain, and pay for them, this is Evidence that I would have all the World trust him; and this a Jury may apply to make a Consent to any particular Contract, but then they must find the Assent in Fact; for that which is the Evidence to them, we cannot judge upon.

3dly, As to the Obligation, it is necessary that this be upon the Party consenting. I know that in some Cases the Obligation of a Contract may be transferred by way of Concomitancy; as to the Husband, it is carried with the Chattels and Person of the Wife; and it lies upon the Heir and Executor when they have Assets; but for a Man to be originally bound by a Contract, it is necessary that there be his Consent; and the Consent of no other Person will serve.

2. To consider what is in the Verdict, and apply what has been said to it. I find in it no Assent of the Husband's found, nor any Authority he gave his Wife, but only Matter of Evidence. I confess, that when a Wife, tho' not particularly appointed, contracts for Necessaries for herself, her Family, her Husband, or her Children, this is great Evidence to a Jury to make them find the Assent of the Husband; for it cannot be reasonably thought that any Man would be so barbarous, as to deny his Assent to have the Necessities of his Family supplied; and so it may be believed and found he did assent. But this is only in Case of Co-habitation;

habitation; for it may be well imagined, that when a Wife leaves her Husband, that he may refuse to supply her; and so in the Verdict, this Matter of Evidence is answer'd by finding that she departed from him; but then there is an Answer on the other Side, that she afterwards, and before this Contract, desired to cohabit with him; to this is reply'd again, with a flat Bar to any Evidence that can be given of an Assent, *viz.* that the Husband did expressly prohibit those Tradesmen to trust her; the Judges, in their Directions to a Jury, direct them to be guided by such Evidence of an Assent, when nothing appears to the Contrary, because it would be very hard, in Point of Proof, to shew express Evidence of Assent to every Particular; but when there is an express Prohibition or Denial of Assent, this takes off all Circumstances of Evidence on the other Side.

3. I am to shew in what Points we all agree, and where we differ.

1st, We all agree, that it is not the Contract of the Wife's to bind her; for in our Law she has no Will nor Power to bind herself; the Civil Law, as it allows her a Property distinct from the Husband's, so it gives her Power to bind herself by Contract.

2^{dly}, It is agreed of all Hands, the Wife ought to be maintained; the Civil Law, tho' it allows the Wife a separate Property, yet the Husband ought to maintain her out of her Dowry; it is more necessary for the Common Law, that takes away all Property from her, to make Provision for her Subsistence, else that which we pretend to be the most reasonable and provident Law in the World, would be the most barbarous; but in this we differ. It is

said by those, who argue that the Husband should be charged, That she may be maintained by a Power the Law gives her, to charge her Husband by way of Contract; which is altogether denied by us.

3dly, We all agree, that when the Wife contracts for the Necessaries of her Husband, Children or Family, that this shall not charge him by any inherent Power in the Wife, but by a reasonable and implicit Assent, which must be found by a Jury; but we differ in the charging him: When she contracts for the Supply of her own Necessities, we say it is not by a Power she has, but there must be his Consent, either express or implied. Secondly, We confess that in Case of Cohabitation, there is great Evidence of his Assent, till the Contrary appears; but it is not so binding as will amount to a Presumption. Thirdly, Therefore we say it must be found by the Jury. Fourthly, That it is countermendable by Prohibition, where it is said on the other Side, (and must be maintained, else they can make nothing of the Case,) that there is in the Wife, upon the Intermarriage, an original, inherent, primogenial, and uncoun-termandable Power to charge the Husband for her Necessities, which the Husband can no ways repeal, though there be no Cohabitation or Consent, but an express Prohibition; and this is the true State of the Question betwixt us; If there be such a Power in the Wife or no, independent upon any Consent of the Husband's? I shall consider,

First, If there be such a Power during Cohabitation. Secondly, If for Necessaries; and here I shall make a second Question, if there be such a finding of Necessaries as is requisite in a Verdict. Thirdly, If the Departure makes nothing in

in the Case. *Fourthly*, Admitting all this, Whether it be countermandable *quoad* one Man.

First, I shall hold there is no such Power in the Wife; my Reasons are,

1st, By the Law of God, of Nature, of Reason, and by the Common Law, the Will of the Wife is subject to the Will of the Husband; and therefore an Indictment for being a Joint-receiver with her Husband was held ill; but if the Law were with those who argue on the other Side, this would be inverted, and the Will of the Husband would be subject to the Will of the Wife.

2dly, Because no Man can be originally bound in a Contract, but by his own Consent.

3dly, To prove the Law on their Side lies upon them, which they have not, nor no ways can do, there being but one Semblance of an Authority they can alledge, which is 11 H. 6. which is the Opinion of Judge *Martin*, and must be intended by way of Evidence; but they say they prove it by Reason and Inconvenience.

1st, I answer, *Argumentum ab Inconvenienti* will not change or alter the Law when it appears to be so; but it is only to prove and interpret the Law, when we are in doubt whether it be so or no.

2dly, I answer, The Inconvenience of the other Side outweighs and is far greater, for it will bring into the Law a manifold Incertainty.

1st, What Things are necessary, what Kind of Necessity, and when and how often this Necessity may happen, as if the Husband should give the Wife Clothes, and she give them away the next Day, she is in as much Ne-

cessity the next Day as she was before, and *quicquid necessitas cogit debetur*.

2dly, There would be great Uncertainty which way she should supply her Necessities; as this Way: 1. Of taking up Goods; and if she can find no Credit with the Mercer, but has the Usurer for her Friend, then the Law sure that provides against her Necessities, will give her Leave to take up Money; and if that fails, it is reasonable that she should sell Goods; for the two other Ways failing, the Law will not let her perish; if there were no Goods, then it were as reasonable she might receive Rents, which would be against *Sir Paul Tracy* and *Dutton's Case*, *Cro. Jac.* and if there were none such, she might raise Money upon the Demise of the Land; if the Law will give way to her Necessities in the first Case, it must yield in all the Rest; for the Case may else be so, that the Provision of Law would be defective: But I hold, that in none of these Cases the Wife can provide for herself; but say, there must be a Trust somewhere; as a Father is bound by the Law of Nature to provide for his Son, and the Son is bound to provide for the Father; but the Law will not give the one Leave to oblige the other by way of Contract, because the Law supposes that they will not be so unnatural, and entrusts them with it; viz. Before the 43 *Eliz.* for the Poor, if this Trust must be somewhere, the Husband knows best how to manage Affairs, and so is fitter to be entrusted by the Law, than any body else. I add, That altho' the Law will not presume so much Ill, as that a Husband should not provide for his Wife's Necessities; yet there is a severe Obligation on him, not only to supply her in Case of Exigencies

gencies and extreme Necessity, but according to Conveniency; but the Law has not made her her own Judge, but provided her a Judicature sufficient to reform the Close-handedness of her Husband; where she is driven to an extreme Necessity, and Want of Subsistence, the Law has appointed a Judge to compel the Husband to supply her; I mean the Chancellor; for upon a *Supplicavit* he may be bound to the Peace, and *bene & honeste tractare*, which I hold not to be understood only, that he must use her gently, and forbear beating her, but that he must supply her Exigencies; then for her Conveniencies, the Law has appointed the Bishop's Courts: And whereas it is said, that this is not the Common Law; I answer, That they are Jurisdictions appointed by the Common Law; and though their Coercion and Proceedings are after another Law, yet their Derivation, as to their Use here, was from the Common Law; and concerning the Amplitude of their Power, which is said not to be able to administer a Medicine sufficient for this Disease; I say, as it is aided by the *Brachium Seculare*, the Power of it falls as severely upon them that disobey it, as the Common Law can use when Men will not pay their Debts; for they may excommunicate, and upon that follows Imprisonment, and a Disability to sue any Action.

The second Objection made on the other Side, is by comparing the Case of a Feme Convert with the Case of an Infant; but I answer, An Infant is disabled only *quoad hoc*, and may oblige himself for Necessaries, but here the Wife would bind the Husband also: In the Case of an Infant, there is Nobody intrusted by the Law to provide for him (for Guardian in Socage is only

for she may make him liable to the greatest Enemy he had in the World. 12 *Ed.* 4. 18. The King may grant to J. S. to be exempt of Juries; but if he grants it to a whole County, Hundred or Township, the Grant is void; and by this Prohibition of the Husband, here is no Discharge of the whole Power, but only it is taken of those particular Persons. If a Man enters into an Obligation not to use his Trade, it is against Law, and void; but if it be not to set up his Trade in such a Street, or Town, it is good.

Note, he added, That as to the Charging the Husband by way of Evidence, which he had restrained to Cohabition, he said, the Law is the same where the Husband departs from the Wife, as upon going beyond Sea, &c.

Since this Resolution, there have been several Cases in which Tradesmen have recover'd in Actions brought against the Husband for Goods deliver'd the Wife; and in all these Cases the Judges have laid down the Distinction of an implied Promise, and directed it as a sufficient Foundation to charge the Husband, and in their Directions have shewn as much Favour as possible to such Tradesmen as intrusted her on the Credit of her Husband, and were in no Combination with the Wife to charge him.

But if a Woman takes up Goods, and pawns them before they are made into Clothes, the Husband shall not pay for them, because they never came to his Use; *Secus*, if made up and worn, and then pawned. 1 *Salk.* 118. If she pawns her Clothes, and borrows Money to redeem them, Husband not liable. 2 *Show.* 283. If Husband and Wife by Agreement live separate, and she has a separate Maintenance, it will

will be presumed that those who deal with her trust her on her own Credit. 1 Salk. 116. Vide Skin. 348. Warning a Tradesman's Servant not to trust her, sufficient Warning to the Master. 1 Salk. 118. A Tradesman, who sold lace and Silver Fringes for a Petticoat and Side-saddle, which amounted to 94 l. and all within four Months, to the Wife of a Serjeant at Law, formerly a Judge, recover'd against him; Skin. 349.

An ordinary working Man marry'd a Woman of the like Condition, and after Cohabitation for some Time, the Husband left her, and during his Absence the Wife worked; and this Action being brought for her Diet, it was held, that the Money she earned should go to keep her. 1 Salk. 118.

If the Wife, whilst she lives separate from her Husband, and has a separate Maintenance, buys Goods of Tradesmen, who know of the Separation and Maintenance, they cannot sue the Executors of the Husband in Chancery for these Goods, neither will Equity give the Executors any Relief, because they have a very good Defence in Law.

Where a Person who lent a Feme Covert Money, which was actually laid out in Necessaries, was allowed to stand in the Place of the Tradesmen, and to have Satisfaction, as far as they could, if they had been Plaintiffs. Preced. in Chan. 502, 523. Where Equity will decree a Wife a separate Maintenance, vide Abri. Eq. 66.

Baron shall not be charged in Trover and Conversion for Things which the Wife buys, though the buying be void: But if the Delivery of Goods be to a Feme Covert, not knowing her to be a Feme Covert, or to an Infant, not

Delivery of Goods to a Feme Covert, not knowing her to be so.

not knowing him to be an Infant, it is other-
wife. *Sid.* 129. *Med. Rep.* 841.

How it is if a
Woman will
not cohabit
with her Hus-
band.

If a Woman will not cohabit with her Hus-
band, and buys Victuals and Chattels for her-
self, and it is given in Evidence to a Jury that
these are Necessaries for the Estate and Degree
of her Husband; yet this is no Evidence for a
Jury to find that the Baron *assumpsit*; and there
is a Difference between those Women that will
cohabit with their Husbands, and those that
will depart of their own Heads.

Declaration.

Action was brought against the Defendant
upon *Indeb. Assumpsit pro diversis mercimoniis
vendit' & deliberat'* to the Wife to the Use of
her Husband, it being for her Wearing Appa-
rel. After Verdict for the Plaintiff, it was
moved in Arrest of Judgment, that this Decla-
ration being laid, that the Sale was to the Wife,
though it was to the Use of the Husband, was
not good, as if it had been sold to the Servant
of the Plaintiff. Yet *per Cur'*, It being for her
Apparel, and that suitable to her Degree, the
Husband was to pay for it; and so it was re-
solved in *Scott and Manby's Case.* 1 *Vent.* 42.
Dyer and East.

Pleading.

In *Assumpsit* the Plaintiff declared upon sever-
al Promises, three whereof were for finding
Lodging so many Months for the Wife of the
Plaintiff at his Request, and the last Promise
was *Indebitat'* for Goods sold to the Defendant
himself. The Defendant pleads, long before he
lodged her, she went away without his Con-
sent, and lived in Adultery with some Persons
unknown from that Time to this present; and
the Plaintiff, before he provided her Lodg-
ing, had Notice of her Departure, and that he
provided Lodging, and sold to her the said
Goods supposed in the Declaration to be sold
to

to the Defendant, without any Assent or Notice of the Defendant, *absque hoc, quod assumpsit super se modo & forma prout, &c. Et hoc paratus, &c.* The Plaintiff demurs. The great Case of *Scott and Manby* was chiefly resolved upon the Prohibition express'd, that the Baron had given Notice not to trust his Wife. *Mod. Rep. 9. Dyer and East.* And the Manner of Pleading is insufficient, for it amounts to the general Issue, and he should have traversed the Request; and for the Goods sold to the Defendant, there is no Answer given: But saith that the Goods supposed to be sold to the Defendant, were delivered and sold to the Wife, which is nothing to the Purpose. The Court gave no Opinion as to the special Matter, but seemed to agree that upon *non Assumpsit* pleaded, the Matter set forth in the Plea would have been good Evidence for the Defendant. And *per Curiam*, The Plea amounts to the General Issue, as to the Lodging found for the Wife; but then this was cured upon a general Demurrer; and because nothing was pleaded as to the Wares alledged to be delivered to the Defendant himself, they gave Judgment *pro Quer'*. Note, The Traverse *absque hoc*, as to the Pleadings, amounts to no more than a Protestation. *2 Vent. 155. Beaumont and Welden.*

General Demurrer.

Trover, how to be laid in this Case.

Indebitat' for Wares sold and delivered to *Mary East*, then and yet the Wife of the Defendant, to the Use of the Defendant. After Verdict, this shall be intended by Consent of the Husband, unless upon Evidence it appears *contra*. In the Case of *Scott and Manby* it was adjudged, that the Husband was not chargeable against his Prohibition, nor upon an Elopement; but the Court agreed there that the Husband

Husband was chargeable for Necessaries, Wearing Apparel; and so it was said in this Case: But in Trover the Conversion must be specially alledged to his Use, and not *ipforum*; and Judgment was *pro Quer.* 2 Keb. 544. *Dyer and East.*

The Wife allowed by the Court to charge her Husband for Necessaries.

H. being in Court on Recognizance, after his Acquittal at Newgate, for having of two Wives, for want of Proof of the last Marriage; the first who prosecuted him, prayed now to charge him with Actions for Necessaries for herself and Children, which she had by him; and by the Court she was allowed, having proved her own Marriage clearly before. 2 Keb. 585. *Hunce and Ux.*

One designing to go beyond Sea to avoid a Sentence for Alimony, a ne exeat Regnum granted to prevent it.

Sir Jerome Smith being sued by his Wife in the Ecclesiastical Court for Alimony, and designing to go beyond Sea to avoid the Sentence; the Court of Chancery, upon Motion, granted a *Ne exeat Regnum*. And the Court being also informed of his hard Usage of his Lady, a *Supplicavit de bono gestu* was also granted.

Husband to pay such Debts as the Wife contracts in his Absence.

Where a Man leaves his Wife, tho' she be never so lewd, he is obliged to pay such Debts as she contracts for Necessaries in his Absence: And so it is said he shall, where she leaves him, if he receives her and is reconciled to her again. 7 Mod. 171.

One compelled to maintain his late Wife's Grandchild.

One married a Feme with a good personal Estate; she died and left a poor Grand-Child: It was resolved that the Husband ought to maintain the Grand-Child; the City of Worcester and Gerard. 1 Sid. 114.

With

With and for what Acts of the Wife the Husband shall be chargeable, or not.

M. S. lived apart from her Husband, and *P.* bringing 100 *l.* to pay *J. S.* (the Defendant) she snatched 20 *l.* out of the 100 *l.* and went away with it. The Defendant would enforce the Plaintiff to pay the 20 *l.* pretending so much due to him by the Plaintiff. But the Court saw no Cause to charge the Plaintiff therewith; neither would they charge the Husband of *M. S.* for the 20 *l.* and ordered *M. S.* to answer the same, or else Process of Contempt. *Plomer's Case*, 1 *Rep. Chan.* 68.

Where the Husband shall not be charged with the Wife's tortious taking of Money.

The Wife received Money due on a Bond to her Husband; she usually received and paid Money for him; and the Husband having got Judgment on the Bond, he was ordered to acknowledge Satisfaction thereupon. 1 *Chan. Ca.* 38.

Several Goods were devised to *A.*'s Wife for Life, and after her Decease to *B.* In this Case, though *A.* and his Wife were parted, and there had been great Suits for Alimony; and she, during the Separation, had wasted the Goods; yet the Lord Keeper thought it reasonable, that the Husband should be charged for this Conversion of the Wife's, *B.*'s Title being paramount the Feme's, and not under her. *Hill.* 1682. 1 *Vern.* 143.

If the Wife, whilst she lives separate from her Husband, and has a separate Maintenance, buys Goods of the Tradesmen, who know of the Separation and Maintenance, they cannot sue the Executors of the Husband for these Goods, neither will Equity give the Executors any Relief, because they have a very good Defence at

U

Law.

Law. *Mich.* 1682. between *Ferrars* and *Ferrars*, 1 *Vern.* 71.

Tort continu'd by taking the Profits by a second and third Husband, and to be answered by them.

Sir Edward Zouch, seised of Lands in Fee, settled them on Trustees after his Death for Payment of Debts, and dies; leaving his Son and Heir an Infant, and Dame *Dorothy* his Widow: She enters upon the Lands, and takes the Profits, and marries *Floyd*, and then he continues to take the Profits; he dies: And afterwards she marries one *Smith*, and he continues to receive the Profits till the Infant comes of Age. The Plaintiff was a Creditor of *Sir Edward's*, and his Bill was against the Heir, *Smith* and his Wife, and the Trustees. It was decreed that the Plaintiff's Debt should be paid, and that both the Lands and *Smith*, in respect of the Profits taken by Dame *Dorothy Floyd* and himself, should be liable to the Payment thereof: For the Tort died not with *Floyd*; as if Feme Tenant for Life marries, and the Husband doth Waste, and dies; Waste lies against the Wife. Feme Executrix takes Husband, that wastes the Testator's Estate; a *Devastavit* lies against the Feme after the Death of the Husband for the Waste of the Husband. *Cases in Chan.* 81. *Gilpin and Smith.*

The Husband charged with the Debt of the Wife for Goods.

The Wife, when sole, bought Goods on Credit, and after married, and died; the Goods came to her Husband's Hands after her Death, but the Debt remain'd unpaid: The Creditor brought a Bill to discover the Goods, and it was demurred to; but the Demurrer was overruled. *Cases in Chan.* 295. *Freeman and Goodham.*

But it has been since held, that where a Man married a Woman Trader, who died, and at her Death was indebted to several Persons for Wares which she had bought of them, and which

which were by her in Specie at the Time of her Death, and came to the Hands of her Husband; that though a Bill be brought against him, that he may either pay for those Goods, or let the Persons have them again; yet he may insist, that he is neither Executor nor Administrator to his Wife, and therefore not liable to her Debts; and that all her Goods belong to him by Law; ruled upon Demurrer. *Trin.* 1700. between *Blackmore* and *Ley*; but *Qu.*

Vide plus infra; where the Husband shall be punished for Torts done by the Wife.

C H A P. XXIV.

Feme Covert, { Executrix,
Administratrix.

How a Feme Covert may be made Executrix, and of what Things; what Things the Administrator of the Wife shall have, and not the Husband, as Choses in Action, &c. Debt recovered by Baron and Feme Executrix, and she dies, if the Husband shall have Execution. What Things Feme Covert Executrix may do without her Husband, or not. Obligee makes the Wife of one of the Obligors Executrix, quid operatur. Legacy devised to the Wife, who is made Executrix. Whether she shall be in as Executrix, or as Legatee. Of her Assent to a Legacy. Debt, as Executrix, not extinct by the Inter-marriage, and why. Feme Executrix takes the Obligor to Husband, if that be a Release in Law. Where the Husband shall be charged with the Waste of the Wife as Administratrix, and the Manner of Proceedings by the Sheriff in such Case; and whether Execution shall be de bonis propriis of the Husband. Of Actions brought by Baron and Feme as Executrix or Administratrix. Where Administration belongs to the Baron and Feme.

First, how a Feme Covert may make Executor, and then how she may be made Executrix.

A Feme Covert may make her Testament of Goods, and make an Executor by the Assent of her Husband.

A Feme Covert may make an Executor of *Choses in Action* due to her. 8 Jac. B. C. *Graunt's Case*; and so is.

18 Ed. 4. 11. b. A Feme, with the Consent of the Husband, may make an Executor of Things, which the Husband shall not have by her Death.

She may make her Husband Executor of the Goods which she hath as Executrix, if he will accept it. 4 H. 6. 31.

A Feme Covert cannot make Executor without the Assent of her Husband, and the Administration of her Goods of Right appertains to her Husband. 4 Co. *Oguel's Case*.

But a Feme Covert Executrix may make an Executor of the Goods which she hath as Executrix, without the Assent of her Husband, and in such Case Administration appertaineth not of Right to the Husband; and what she had as Executrix, she had *en autre droit*, and not otherwise an Interest in the same. M. 8 Jac. *Graunt's Case*.

If a Feme Covert dies intestate, Administration may be granted of her Goods; for peradventure she had *Choses in Action*, which are not given to the Husband by Law, *Dyer* 251. admitted.

Administration of the Goods of a Feme Covert.

What Things the Administrator of the Wife shall have, and not the Husband.

The Wife's Administrator shall have *Choses in Action* always, and not the surviving Husband; as in Case of Lease or Bond: As if an Obligation be made to the Use of the Wife. The Case was; *Arthur Johnson* was possessed of a Term for Years, and assigns it over to J. S. being Brother to the Wife of the said

Johnson, to the Use of the said Wife: *Johnson* dies, and makes his Wife Executrix, after which the said Wife takes *Rob. W.* to Husband, who takes the Profits of the said Lands during the Life of the Wife; the Wife dies intestate, *J. S.* as next of Kin, took Administration as well of the Goods of the said Wife, as of her first Husband. By all the Judges, The Administrator had now as well the Interest as the Use of the said Term, as well in Conscience as Law: And *Rob. W.* shall not have it, because it is a Thing in Action, which the Administrator of the Wife shall always have, and not the Husband; as if an Obligation had been made to the Use of the Wife. *Pop. 106.*

Ar. Johnson's Case.

Arrears of
Rent.

Feme, as Administratrix to her Husband, brought Debt for Arrears of Rent incurred in the Life of the Husband; which Rent was granted jointly to a Baron and Feme. *Per Curiam*: The Arrears belong to the Wife *in jure proprio*, and not as Administratrix of the Husband, and the Naming her Administratrix was Surplusage. *Moor 886. Dembian and Brown.*

Feme Legatee
and Executrix,
Election.

Lease to *J. S.* who assigned it over to *K.* who by his Will devised the same to his Wife, who made her Executrix also; and she afterwards took one *W.* to Husband, and died. *W.* takes out Letters of Administration of the Goods and Chattels of his Wife, and leased it to the Plaintiff: The Question was, If the Wife be in as Executrix or Legatee, for until Election made she shall not have it as Legatee? But it was proved that the said Wife, Executrix to her Husband, had made a Lease by Deed, reciting thereby, that where the Husband was possessed in Right of his Wife, as

Execu-

Executrix of her first Husband. *Per totam Curiam*: This is an exprefs Claim as Executrix; and then when the Wife dies, if the Husband would have Advantage of it, he ought to take out Letters of Administration of the Goods of the first Husband. *Vid. 1 Leon. 215. Cheney and Smith.*

A Woman is made Executrix, and after *Assent to a* married, she cannot now assent to a Legacy, *Legacy.* there being no Interest vested in the Husband. *Contra*, Of a bare Authority given her to sell; but by *Wyndham*, This Assent, and the Husband's not contradicting it, is good Evidence that he did agree. *1 Keb. 708. Cook and Bellamy.*

What Things Feme Covert Executrix may do without her Husband, or not.

Feme Covert Executrix may make an Executor without his Assent.

Feme Covert Executrix, without her Husband, acknowledgeth Satisfaction of a Judgment without real Satisfaction had; it is not good. *Sid. p. 31. Lady Fenner and Sir Lewis Dives.* *Acknowledge Satisfaction.*

Feme Executrix may not give the Goods of the Testator *in pios usus*, without the Assent of the Husband. *Vid. 14 H. 6. 4. Vid. Coke, p. 9, 43.*

In *Russel's Case*, *5 Rep. 27.* it is agreed, that a married Wife cannot do any Thing as Executrix in Prejudice of her Husband.

Two were bound to a third jointly and severally; the Obligee made the Wife of one of the Obligors Executrix, and deviseth to her all his Goods, after Debts and Legacies paid, and dies: The Woman Executrix administers;

Obligee makes
the Wife of one
of the Obligors
Executrix.

Regula.

Obligor makes
the Executrix
of the Obligees
his Executrix.
Feme Execu-
trix of a Debtee
takes the Obli-
gor to Husband.

then the same Obligor made her his Executrix, and died, leaving Assets to pay the Debt; then the Wife dies intestate, and the Plaintiff administer'd *de bonis non*, the Obligee brings Action and sues the surviving Obligor. It was resolved that the Action lies not: 1. When the Obligee made the Wife of one of the Obligors Executrix, the Action was suspended during the Continuance of the Executorship; and then the Rule is, a personal Action once suspended is extinct, if it be by his own Act, as here it is, by making the Woman Executrix; *aliter* by Act in Law. 2. When the Obligor made the Executrix of the Obligee his Executrix, and left Assets, the Debt was presently satisfied by way of Retainer, and so no new Action can be had for that Debt. *Hob. 10. Fryer and Gildrige. Moor 855. Mesme Case*: But if a Feme Executrix of a Debtee takes the Obligor to Husband, and after the Baron dies, this Suspension is not any Extinguishment, because it was by Act in Law, and *in autre droit*. *M. 30 & 31 Eliz. Sir John Needham's Case, 8 Co. 136.*

Debt suspended

A Feme Executrix marries with a Debtor of the Testator; the Husband dies, and Debt was brought against the Feme, who pleads *Rien's enter les mains*; and if this were Assets was the Question. *Per Curiam*: This Debt is not Assets in her Hands; for by the Intermarriage the Debt which the Executrix had *en autre droit*, was not extinct, but suspended; and the Action was revived against the Executors of the Baron, and compared it to *Darcy's Case* in the Commentaries. *Cro. Eliz. 114. Crossman and Read.*

Though

Though if the Feme Obligee take the Obligor to Husband, this is a Release in Law; but if a Feme Executrix takes the Debtor to Husband, this is no Release in Law; for that should work a *Devastavit*, which an Act in Law shall not work. 1 *Inst.* 264. b.

Feme Obligee takes the Obligor to Husband

If a Man takes to Wife an Executrix, all the Debts being paid, and he hath Goods in his Hands to pay Legacies, the Wife dies, the Husband cannot be sued for these Legacies in the Ecclesiastical Court by the Legatees; for the next of Kin to the Wife may have Letters of Administration granted to him of these Goods in the Hands of the Husband. And therefore if such Husband, after his Wife's Death, makes a Promise, That in Consideration he had the Goods, being more than would satisfy, if the Plaintiff, being Legatee, would forbear to sue him for such a Time, he would pay the Legacy. It is a good Consideration. 1 *Bulst.* 44. *Smith and Jones.*

Administratrix dur' minoritate of the Daughter; Executrix made divers Bonds to the Creditors of the Testator, and then took Husband, *Per Curiam*: The Husband may retain so much of the Testator's Goods as, amounted to the Value of the Debts paid. But *Hobart*, p. 250. makes it a Question, How the Case shall be if the Wife die? for then the Husband is no longer chargeable by her Bond: But it is said in 1 *Roll. Abr.* 923. If the Husband, in the Life of the Wife, declare that he retains such particular Goods instead of the Obligations, although the Wife after dies; yet by the Declaration the Propriety was absolutely altered in the Husband, and then the Death of the Wife will not devert it. *Briers and Goddard.*

Of Husband retaining Goods.

Alteration of the Property of the Goods.

Feme

Feme and another Person are Executors. Feme takes Husband, the Husband doth not alter the Property of the Goods of the Testator, and the Wife dies; now the other Executor shall have Action of Detinue against the same Husband of the said Goods. *Bentley* N^o. 38. p. 10.

Feme Executrix takes the Obligee to Husband, the Debt is not extinguished.

Her Testator's Effects, which remain in Specie, go to his Administrator de bonis non. Tho' the Feme refuses the Executorship, the Husband may administer. Administration, Part to the Brother, and the Residue to the Wife.

Husband enabled to administer to his Wife.

If the Executrix of an Obligee takes the Obligor to her Husband, this is no Extinguishment of the Debt: But if the Obligee herself make the Obligor her Husband, that is an Extinguishment: Where a Feme Covert Executrix dies, such of the Testator's Goods as remain in Specie shall go to his Administrator *de bonis non*, and so shall his Money, if it be kept by itself; but if the Husband seizes it, it will be his, and will be a *Devastavit*: Where a Feme Covert is Executrix, the Husband may administer, and bind her, tho' she refuses, and may release the Debt of her Testator. *Salk. Rep.* 306.

A Person died intestate, leaving a Wife and Brother; the Ordinary granted the Administration of some Debts to the Brother, and of the Residue to the Wife. *Per Curiam*: The Ordinary may grant Administration, either to the Wife or next of Kin, but the Wife shall have her Share, according to the Stat. *Of Distributions*: And the Court held, that the Ordinary may grant Administration to the Brother *quoad* Part, and to the Wife for the Rest: But where the Wife dies, Administration can be granted only to the Husband, if he request it. *Shower's Rep.* 351. *Salk.* 36.

Where

Where the Husband shall be charged with the Waste of the Wife Administratrix: The Manner of the Proceeding of the Sheriff in such Case; and whether Execution shall be de bonis propriis of the Husband.

If *A.* recover against *B.* Debt and Damages, and after *B.* dies, and Administration is granted to *C.* his Wife, who wastes the Goods; and after she takes *D.* to Husband, and a *Fieri fac'* is awarded *de bonis Testatoris* in the Hands of *D.* and *C.* the Sheriff returns *nulla bona, &c.* And upon this, on Surmise that they have wasted the Goods, other Writ is awarded to the Sheriff, *si sibi constare poterit per Inquisitionem*, that they have wasted; then to warn them to shew Cause why Execution should not be *de bonis propriis*, and the Inquest find this Matter, and refer it to the Court, whether the Husband and Wife have wasted the Goods of the Testator, according to the Writ, or not? Upon this special Return, the Court shall award Execution *de bonis propriis* of the Baron and Feme; for the Sheriff had returned the special Matter, and therefore the Husband is to be charged for the Conversion of the Wife. *M. 16 Car. 1. B. R. Knight and Hilton & Ux. vers. Copping. 18 H. 6. 14. b.*

Where Execution shall be de bonis propriis of the Husband.

Upon Suggestion of a *Devastavit* of a Feme Executrix, it was laid, that the Baron and Feme *Devastaver'* and *Converter' ad usum ipsorum*; and upon the Issue it was found accordingly: It was moved in Arrest of Judgment, that they could not convert to their own Use; and so in Trover and Conversion, *quod Converter' ad usum ipsorum*, is not good. But *per Curiam*: Here the material Part of the Issue was, the Wasting

Declaration in Waste against Baron and Feme Executrix.

Wasting of the Baron and Feme, which they might do jointly, and the Conversion is nothing to the Purpose. 2 Vent. 45.

Now the Reason why Execution should be *de bonis propriis* of Baron and Feme, is, the Wife may have Goods as a Term, or Chattels real, before the Coverture; also she may have Goods after the Husband's Decease; and therefore in Debt the Husband is charged in Right of his Wife, as Executrix, and Judgment is given against them, it shall be *de bonis suis propriis*, and good. And it was resolved, Cro. Car. 519, in Mounson and Bourne's Case, that a *Devastavit* may be by a Feme by eloining the Goods, as a Feme Covert may do a Tort, and be punished for it. It was held also, that if a Man take Executrix to Wife, and waste the Goods, it is a *Devastavit* in the Wife. And if there be a Recovery against Baron and Feme upon a *Devastavit*, if the Baron survive the Wife, he shall be charged; also if the Feme survive, she shall be charged: But if the Recovery be not against Baron and Feme in the Life of the Wife, and she dies, the Baron shall not be charged.

Where the
Husband shall
not be charged.

Baron and
Feme committed
to the Fleet
on a *Devastavit*.

Feme is Executrix of her first Husband, and she administred when she was sole, and then takes a second Husband; and there is a *Devastavit* return'd, and a *Capias, aut Satisfaciendum* against both *de bonis propriis*, and the Husband was committed to the Fleet, and so was the Wife, because the Devastation of the Husband shall be the Act of the Wife. Dyer 216. Marg. M. 38 & 39 Eliz. B. C. Vaughan and Thomas.

A Woman is indebted by Obligation as Executrix, and had Assets of the Goods for the Debt, and after takes Husband, the Debtee demands the Debt of the Husband, and thereupon they submit themselves to Arbitration of all

all Actions and Demands; the Arbitrators may make an Award of this Debt, that the Wife of the Husband, as Executrix, ow'd to the Debtee. And *per Coke*, in this Case, though no Assets came to the Hands of the Husband, yet he is chargeable for the *Devastavit* made by the Wife before Coverture.

Husband chargeable with a Devastavit of the Wife, tho' no Assets came to his Hands.

So 21 H. 7. 29. b. The Husband submits all Actions and Trespasses, &c. and the Award was of a Debt due to the Wife as Executrix. *Per Curiam*: This is a good Bar of the Debt of the Wife. 1 Roll. Rep. 269. *Lumley and Hutton.*

Award of a Debt due to the Wife as Executrix.

In Debt on Obligation against J. and his Wife as Administratrix; the Defendant pleads Payment by the Wife after the Intestate's Death, and on that Issue found *pro Quer'*: Judgment was *quod recuperet debitum* against them, *de bonis Testatoris, si non, &c.* the Damages *de bonis propriis*. *Per Curiam*: This Judgment is well given; 1. Although the Plea be false, yet he is altogether a Stranger to the Testator; and therefore the Judgment shall be only *de bonis Testatoris*, and where he pleads fully administered, which is false in his own Conscience: Although the Wife hath not any Goods during the Coverture, yet because the Husband is only charged in respect of the Wife, and she might have Goods if she survived, and Execution might be taken against her, the Judgment is good. *Cro. Jac.* 116. *John's and Adams.*

Judgment quod recuperet debitum against Baron and Feme, de bonis Testatoris, si non, &c. the Damages de bonis propriis.

It is said in *Roll. Abr.* 919. If a Feme Executrix take Husband, who wastes the Goods, the Feme dies, by the Common Law there is not any Remedy against the Husband: But in this Case, by the Ecclesiastical Law, the Husband shall be punish'd and compell'd to make Restitu-

Devastavit
returned a-
gainst Baron
and Feme;
Feme dies, the
Husband shall
be charged.
Prohibition a-
gainst a Spo-
liation.

Restitution; but if a *Devastavit* is return'd a-
gainst Baron and Feme, and the Feme dies, yet
the Husband shall be charged. *Sid.* 330.

If the Husband possess'd of Goods in the
Right of his Wife dies, and after a new Admi-
nistration is granted to J. S. who sues the
Grantee of the Goods for a *Spoliation*, in the
Ecclesiastical Court, a Prohibition lies. *M.* 11
Car. 2. *B. R. Clarke and Daniel.* So if such
Husband waste the Goods, and after the Waste
dies, if the Husband be sued in the Spiritual
Court for a *Spoliation*, or a Waste of the
Goods, a Prohibition lies. *2 Roll. Abr.* 302.

The Plaintiff being Executrix and Residuary
Legatee of her former Husband, lends 100 l.
to A. and B. and took a Note for it in her
own Name, and a Bond in a Trustee's Name,
and after marries B. one of the Obligors; and
it was held, that the Bond was not extinct.
Pasch. 1693. between Cotton and Cotton. *Vid.*
Vern. 290.

Term extinct
in one Respect,
yet remains
Assets in an-
other.

Feme Executrix hath a Term, and takes Hus-
band, and the Husband purchaseth the Rever-
sion, the Term is extinct, as to her, if she sur-
vive; but as to all Strangers, it shall be ac-
counted as Assets in her Hands. *Moor* 54.
1 Leon. 720. *Crossman and Reade.* In *Leon.* the
Case was, J. S. made his Wife Executrix, and
died; J. D. being then indebted to the Tes-
tator in 60 l. upon a simple Contract, the Wife
Executrix took to Husband the said J. D.
J. D. made his Executor and died: A Cre-
ditor of J. S. brings an Action of Debt against
the Wife, Executrix of J. S. and upon the
Pleading, the Matter in Question was, If by
the Intermarriage of the Wife with the Debtor
of the Testator, the same were a *Devastavit*,
or not; and if the said Debt of 60 l. due by
J. D.

Intermarriage
of a Feme with
a Debtor of the
Testator.

J. D. should be Assets in her Hands? And *per Curiam*, It is no *Devastavit* nor Assets; for the Woman may have an Action against the Executor of *J. D.* And it was agreed *per Curiam*, that if a Man make a Debtor and a Stranger his Executors, and the Debtor dieth, the surviving Executor may have an Action of Debt against the Executor of the Debtor.

If a Feme Covert, Executrix to *J. S.* take Debt on Bond Husband, and after the Husband and Wife bring Action of Debt on Obligation in Right of the Wife, as Executrix to *J. S.* against *J. D.* and have Judgment against him to recover the Debt, with Damages and Costs; and after the Wife dies before Execution sued, the Husband shall not have Execution upon this Judgment; for that (though he is privy to the Judgment) yet he shall not have the Thing recover'd; but this appertains to the succeeding Executor or Administrator of *J. S.* *M. 7 Car. B. R. Beaumont and Long, vide supra, Trin. 11 Car. B. R. Jefferies's Case. Cro. Car. 208, 227.* After a Year and Day, the Husband brought *Scire fac'* to have Execution. But *per Curiam*, The *Scire fa'* lies not; for the first Action was brought by the Baron and Feme Administratrix, which is *en auter droit*, and the Recovery being thereupon, is in Right of the Intestate; and the Feme being dead, the Baron cannot claim that Debt; for the Administratrix being Dead, the Suit is merely determin'd, and cannot be revived by any but he who comes in that Right, and so doth not the Husband; and he who ought to have the *Scire fac'* might have Privy and Property in the Debt, and the Husband hath no Property in it.

Debt on Bond by Baron and Feme Executrix, and they have Judgment; Feme dies, and the Husband shall not have Execution, and why.

If a Man marries an Executrix, he shall answer for so much of the Personal Estate as she pos-

possess'd, although he took it as a Portion with her; and this not only in Favour of Creditors, but likewise of an Heir. *Pasch.* 1688. between *Batchelor* and *Beau*, 2 *Vern.* 61.

But if a Feme Administratrix wastes the Assets, and then marries, and dies, the Husband is liable to no more than the Value of what came to his or his Wife's Hands after the Marriage. Decreed *Mich.* 1689. 2 *Vern.* 118.

The Defendant had marry'd an Administratrix to her former Husband, to a Share of whose Personal Estate the Plaintiff was intitled; the Administratrix was likewise intitled to a Third, and before her second Marriage had wasted great Part of the Estate, and then died; and a Bill was brought against her Husband, to have an Account of the Estate, and a Satisfaction for his Share; and being heard at the Rolls, an Account was decreed to be taken of what of the Estate had come to the Hands of the Administratrix before her second Marriage, and the Plaintiff to have a Satisfaction against the Defendant absolutely, for so much as came to his or his Wife's Hands after Marriage, and for what came to her Hands before her second Marriage, to have Satisfaction against the Defendant, so far as he had any Estate of his Wife's; and this Decree was affirmed by my Lord Chancellor, *Pasch.* 1706. between *Powell* and *Bell*; and it was said to have been several Times held, That where a Man marries a Woman, without stipulating for any particular Fortune, or making any Settlement; and after the Death of the Wife, Debts of hers appear; the Husband not being a Purchaser, in such Case shall be answerable for the Debts of the Wife in Equity, as far as he had any Money or other Personal Estate of hers.

If the first Husband and Wife are guilty of a *Devastavit*, and there is a Bond Debt due: *Per Cur'*, This makes such a Lien by the Deed, that the second Husband is bound; but where there is barely a Breach of Trust, or a Debt by simple Contract, there in Equity the Plaintiff ought to follow the Estate of the Wife in the Hands of the Executor of the first Husband. *Hill. 1684. 1 Vern. 309.*

W. and his Wife being possess'd in Right of his Wife of a Term, which she had as Administratrix to her first Husband *C. W.* being indebted, by Contract granted the Term to *Coleman*, to the Use of *W.* and his Wife for their Lives, and after to the Use of *Coleman* himself. *W.* is sued for this Debt, and Recovery against him, and the Sheriff by *Fieri fac'* sold the Term to the Defendant. The Grant of the Term is not void by Stat. 3 *H. 7.* as made to defraud Creditors; for this Grant is not to avoid Creditors; for the Term being in the Right of the Wife as Administratrix, if it so continued in the Hands of *W.* and had never been granted, this was not extendible for the Debt of *W.* and if *W.* himself had it as Executor, it had not been extendible for his proper Debt, and Fraud shall not be intended, except expressly found.

Term in the Wife as Administratrix, if extendible for the Debt of her Husband.

Actions. Vide supra.

A Feme Executrix takes Husband, they bring Action of Debt as Executrix, and recover and have Judgment; but in Bar of this, the Outlawry of the Baron is pleaded. *Per Curiam*: The Baron forfeits nothing of the Goods which the Wife had as Executrix. 3 *Bulst. 210. Hix and Ux' versus Harrison.*

By Outlawry the Husband forfeits no Goods as the Wife had as Executrix.

Indebitatus by Baron and Feme as Administratrix of J. S. on Account as Administratrix, and Arrearages found to Baron and Feme as Administratrix: The Defendant demurs, because it is not said, the Debt was due to the Wife as Administratrix. 3 Keb. 396.

Covenant with a Feme to pay A. 100 l. per Annum. Feme takes Husband, Husband makes Executor, and dies; the Executor may sue for the Arrears.

A Feme Sole delivers a certain Sum of Money into the Hands of J. S. the Defendant thereupon covenants with the Feme to pay to A. B. 100 l. per Annum, so long as the Money shall continue in the Hands of J. S. the Feme takes Husband, the 100 l. per Annum is Arrear; the Husband makes his Executor, and dies; and after his Death, the 100 l. per Annum is in Arrear also: The Executor brings Action of Covenant upon the Indenture, and good; for the Covenant concerns the Executor, because he represents the Testator. Style 140. Pope and Hunt.

By Grant of omnia bona & catalla sua by Administratrix, what passeth.

If Administratrix takes Husband, and the Husband grants *omnia bona & catalla sua*, and it is express'd in the Deed that he gives an Horse in the Name of Seisin of the Goods, which Horse is Parcel of the Goods of the Intestate, as it is found by Special Verdict, the Goods of the Intestate shall pass by this Grant. 2 Roll. Abr. 58.

Obligee made his Wife Executrix, and died; and the Wife, being Executrix, died intestate: The Plaintiff in the Action took out Letters of Administration of the Goods and Chattels of the Wife, and brought this Action of Debt on the Bond as Administratrix of the Wife; whereas the Plaintiff ought first to have taken out Letters of Administration *de bonis non Administratis* of the Testator, and so to have brought her Action. Style 225. Leg and Anderson.

Assumpsit

Assumpsit against the Wife of an Intestate, in Consideration of Forbearance, is not good, unless she administer. 1 Leon. 240. *Eilwicks and Holt.*

Indebitatus' Assumpsit for Money received by the Defendant to the Use of the Plaintiffs; the Defendant pleads *quod Causa Actionis non accrevit infra sex Annos.* The Plaintiffs reply, that the Party died intestate *tali Die*, and that no Administration was committed till such a Time; and then Administration was committed to the Wife, *Et sic Causa Actionis accrevit, &c.* and conclude to the Country, and (as it should seem) the Defendant demurred.

Holt C. J. It hath obtained, that an *Indebitatus* lieth in such Case, but it seemeth not proper to the Use of both, (though it may conclude *ad damnum ipsorum*); for the Difference is, where Wife hath the Chose in Action in her own Right, and where *en auter droit*; in the one Case it shall survive; in the other not; but where there is Judgment against a *Feme Sole*, and afterwards a *Scire facias*, and Judgment thereupon against Husband and Wife, and she dies, the Husband is bound; *quod nota.* *Comberb. 311.*

Error out of *Ireland*, where there was a Judgment against *Feme Sole*, who married; a *Scire facias* issued against the Husband and Wife, and Judgment against them, and two *Nichils*, the Wife dies; a second *Scire facias* is awarded against the Husband, and Judgment thereupon against him, and Execution awarded: The Question is, If the Husband be chargeable? This Case was well debated, and Judgment was affirmed. *Comberb. 103.*

Where and how Administration belongs to Husband or Wife.

Administration, by our Law, belongs to the Husband, and not the Wife's Kindred, by the Stat. 31 *Ed.* 3. *cap.* 11. and the Stat. 21 *H.* 8. does not compel the Husband to take Administration; for it is a Penal Law, and extends only to the Wife and Children; so is 4 *Rep.* 51. *Oguel's Case.* *Cro. Car.* 106. *Johns and Rowe.*

The Daughter takes Husband, and dies; the Mother obtains Letters of Administration; and a Prohibition was denied, because Administration ought to be granted to the Husband, and not to the Mother; and it is not like to the Case of two *in equali gradu*, and one obtains Letters of Administration, which shall not be repealed, because they have executed their Power. *Sid.* 409.

C H A P. XXV.

Actions, Suits.

Abatement of a Writ or Suit in Law or Equity, by Marriage or Death, pending the Suit. If the Wife be put before the Husband, the Writ abates. Feme Plaintiff after Writ of Enquiry, and before the Return marries, if the Action shall abate. Feme Sole, depending a Bill in Chancery, takes Husband, if the Suit shall abate. How it is if she be Defendant: Of Actions which the Husband may have for Wrongs done to the Wife. Indictment by Baron and Feme, and against Baron and Feme. Where and in what Cases Wives are indictable, without their Husbands, or not.

*Abatement by { Marriage,
Death.*

BY Marriage: It is a Rule,

The Taking of a Husband between the *Nisi* Regula. Prius and the Day in Banco, is not Error, because it is but a Plea in Abatement; but the Death of one of the Parties is Error, because by this the Writ is abated, though it cannot be pleaded. *Sid.* 143.

W. and his Wife brought Case for slanderous Words against *H.* and his Wife: *H.* the Defendant dies, the Feme takes another Husband, pendant the Suit; the Court inclined, because the Defendant had, by her Intermarriage, changed her Name, that the Writ abated. *Style* 138. *White and Harwood.*

If Feme Sole Plaintiff takes Husband, the Writ is not abated, but abateable. 1 Leon. 168, 169.

Death or Coverture at the Time of the Writ purchased, abates the Writ *de Facto*; but Coverture after makes it abateable; i. e. only by Plea.

Plea, at the Day in Banco, that after the Verdict, and before that Day, the Plaintiff took Husband.

Trespas was brought by the Plaintiff, being a Feme Sole: It was tried by *Nisi Prius*, and Verdict *pro Quer'* and Damages. The Defendant at the Day in Banco pleads, that after the Verdict, and before that Day, the Plaintiff took to Husband one J. S. and she being married, demanded Judgment. *Per Curiam*: This Plea cannot be pleaded; for the Defendant hath no Day to plead it; and the Plaintiff had Judgment. Cro. Car. 232.

Feme makes a Letter of Attorney to the Plaintiff to gain a Debt, and then marries; this is not any Countermand or Revocation of the Suit, and the Writ is not abated, but only abateable. 1 Leon. 189. Lee and Madox.

Feme Defendant in the Palace-Court married, and removed the Cause into B. R.

An Action of Debt was brought against a Feme Sole in the Palace-Court; after Appearance and Plea pleaded, she marry'd and remov'd the Cause into the King's Bench by *Habeas Corpus*; and here the Plaintiff declared against her in *Custod' Mar'*. The Defendant pleaded in Abatement, she was marry'd at the Time of the *Habeas Corpus* sued out; and ruled to be a good Plea; for here the Proceedings are *de novo*, and the Court takes no Notice of the Proceedings below, or of what preceded the *Habeas Corpus*. Salk. Rep. fo. 8.

By Death.

Action was brought by *H.* against Sir *Thomas Pope*, and *A.* his Wife, as Daughter and Heir of Sir *Tho. W.* and hanging the Writ, *Pope* died: *Hobart* was of Opinion, that the Writ shall not abate. But Executrix brings an Action in her own Name, and the Name of her Husband, and pendant the Writ, the Baron dies, the Writ shall abate. *Winch, p. 102. Holman vers. Sir Tho. Pope and his Wife.*

Feme, pendant the Writ against her, takes Husband; this doth not abate the Writ, but the Recovery against her upon the first Writ is good: But if after the original Proceſs sued, and before the Return she take Husband, this shall abate the Writ. By *Doderidge* in *Heydon and Miller's Case*, 2 *Roll. Rep.* 53.

Baron and Feme bring several Writs of Scire *Several Writs fac' against Ter-tenants in divers Counties: of Scire fac' Judgment is given against some of them by by Baron and Default, and pendant the Pleas of others; and, Feme, against before any Execution, the Baron dies: Quære, Ter-tenants, Baron dies; If all the Writ abate as well against those against Quære, If whom Judgment was given, as against those Writ abate who have pleaded. Hob. 287. against all.*

Trespas against Baron and Feme; after Verdict *pro Quer'*, the Plaintiff died, between the Day of *Nisi Prius* and the Day in Banco. In 11 *H. 6. 7. b.* it is held by all the Court, that the Death of the Plaintiff or Defendant, after Verdict by *Nisi Prius*, and before the Day in Banco, shall abate the Writ or Bill: But the Court doubted in the principal Case, because this is an Action of Trespas, which is but personal, and is joint and several; and it is clear, if the Feme had been dead, and the Baron survived,

vived, Judgment should have been enter'd against him ; and the Reason is the same, that the surviving should be chargeable for the Trespas. *Adjournatur. Cro. Car. 509.* but in *Cro. Jac. 356.* in the Case of *Ridgley* against *Lee* and his Wife. In Ejectment, the Husband died since the *Nisi Prius*, and before the Day in Bank. And *per Curiam* ; Because it is in the Nature of a Trespas, and the Feme is charg'd for her own Fact, the Action continues against the Wife, and Judgment should be enter'd against her sole, because the Husband was dead.

The Wife is put in the Writ before the Husband.

The Writ shall abate if the Wife be put before the Husband. *2 Leon. p. 59.*

A Writ brought against Baron and Feme abates by the Death of the Feme, though after Verdict. *Hob. 129.*

Ejectment.

Ejectment *versus* Baron and Feme ; and tho' they are one Person in Law, yet if Baron die, the Plaintiff may proceed against the Wife.

Writ abateable by Plea.

If a Feme sole bring Trespas and recover, and a Writ of Enquiry of Damages is awarded, and before the Return of it the Plaintiff takes Husband ; and after the Writ is returned, and Judgment given upon it, without any Exception taken by the Defendant, he shall not have Advantage of this in a Writ of Error, because the Writ was but abateable by Plea. *1 Roll. Abr. 781. Smith and Odiham.*

Abatement in Chancery Suits.

If a Feme sole takes Husband *pendente Lite*, the Feme, by her own Act, hath abated her Suit ; otherwise where she is Defendant.

If a Feme sole have a Bill depending in the Court of Chancery, and pendant the Suit, takes Husband ; by this her own Act her Suit is abated ;

abated; and if she and her Husband will have the Effect of the Suit, they must both join in a Bill of Reviver: But if a Feme sole in such Case be a Defendant, and marries, in that Case the Plaintiff may go on with his Suit; for the Marriage is no Abatement or Impediment, because she is Defendant.

If a Plaintiff exhibits a Bill against a Feme sole, whereto she maketh Answer, and after marrieth; the Plaintiff may proceed against her and her Husband, without any Reviver, and her Husband shall be bound by that Answer she made before Marriage, in regard she shall not be admitted to take Advantage of her own Act; contrary where a Woman sole exhibits her Bill, to which the Defendant answereth, and then marries; her Husband and she cannot proceed against the Defendant, without Bill of Reviver.

If a Man and his Wife exhibit their Bill of Complaint, whereto the Defendant answereth, and the Man dieth, the Woman shall be at her Election, whether she will exhibit a new Bill, or proceed upon the former; and the Defendant shall be bound by the Answer made to the Man and his Wife.

Baron and Feme join in a Bill for a Duty due to the Wife; she dieth before the Hearing, the Baron, after her Decease, exhibited a new Bill, and served Process to hear Judgment; because the Defendant was not called to answer, the Hearing was put off.

If a Man exhibit a Bill against a Man and his Wife, for a Matter which wholly concerneth the Wife, and both answer, and after the Baron dies; this is an Abatement of the Suit, that the Plaintiff cannot proceed against the Feme without Reviver; for the Feme shall not be
con-

constrain'd to abide by that Answer which she made with her Husband; because she was then under the Power and Coercion of her Husband; and he being dead, and she seised and possess'd of the Thing in Question as her former Estate, she ought to make new Answer, otherwise ought not to be bound in Equity; but if she abide by her Answer made with her Husband, then the Plaintiff may proceed, and have a Decree to bind her.

If Baron and Feme, in the Right of the Wife, exhibit their Bill upon a Matter in Equity, whereunto the Defendant answereth, and the Feme dies; this is, in some Cases, an Abatement of the Suit. As for Instance; If the Wife be Guardian in Socage, and taketh Husband, yet the Feme continues Guardian; and if Baron and Feme in that Capacity exhibit their Bill for any Matter in Equity, and the Wife dies, it is an Abatement of the Suit.

Of Actions which the Husband may have for Wrongs done to the Wife. Vide Indictment.

Trespas. de Uxore rapta & abducta cum bonis viri. Vide Dyer 256. pl. 10. 2 Cro. 502, 538. 2 Inst. 181; 434. Fitz. N. B. 84. W. 1. c. 34. 6 Rep. 46. Dyer 207.

The Stat. 6 R. 2. gives Appeal of Rape to the Husband, where the Wife consents to the Ravisher; but the Husband in Reputation shall not have the Action: But where it is a Marriage voidable, till the Marriage be adnulled, the Husband may have Action within this Statute; but if the Wife take two Husbands, the second Husband may not, because he is not Baron *de Facto*, or *de Jure*. *Lit. Rep. 75.*

Indict-

Indictments. Vide Information and Offences.

Indictment for Assault and Battery made up- *Assault and*
on Baron and Feme, and for pulling down the *Battery.*
House of the Husband. Exception was taken,
because the Indictment did conclude *ad dam-*
num ipsorum, whereas it should be *ad damnum*
of the Husband only. But *per Curiam*: The
Indictment is good, though *ad damnum ipsorum*
is left out. *Style, p. 155.*

Action on the Case, in Nature of a Conspi-
racy, was brought against A. and B. his Wife;
for that they *malitiose* conspired to indict him
for stealing a Woman's Ruff, *de bonis & catallis*
of B. the Wife; and not guilty was pleaded,
and Verdict for the Plaintiff.

Though a Feme Covert may not have any (*Goods of the*
Goods, yet being after Verdict, it shall be in- *Wife*) how to
tended to be as it may be, (*viz.*) that these *construe after*
were the Goods of the Wife, *dum sola fuit*; and *a Verdict.*
that the Stealing was intended then, and not
whilst she was a Feme Covert. 1 Roll. Abr. 3.
Skinner and Parker.

Where Wives are indictable without their Hus-
bands, or not.

It was a Question in *Fenner's Case*, Whether
a Feme Covert may be indicted without her
Husband, for forestalling or ingrossing *contra*
fermam Statuti: And no Opinion was given,
because the Indictment was *F. Spinster, alias*
dict' Wife of *F.* so that it does not appear pro-
perly by the Indictment, that she is a Feme
Covert, because this which comes after the
alias dict' is not Parcel of the Name. But it
was

was agreed, that for greater Offences, as for Recusancy, Felony, Wives are indictable without their Husbands. *Sid.* 410. *Fenner's Case*; but the Husband being in Court, they set a Fine upon him.

Wife indicted with her Husband for keeping a Bawdy-House.

The Wife may be indicted with the Husband for keeping a common Bawdy-House; for by Keeping is not to be understood the Point of Property, but the Governing and Ordering the House in such Manner, as to become a common Nuisance. *Salk.* 384.

Wife assisting her Husband to commit Burglary or Felony, no Felon.

Resolved by all the Judges, That if a Man and his Wife go both together to commit a Burglary, and both of them break a House in the Night-time, and enter and steal Goods; that this is no Felony in the Wife, for the Wife being with the Husband in the Act, the Law supposes that the Wife does it by the Coercion of the Husband; and so it is in all Larcenies: But as to Murder, if the Husband and Wife join in it, they are equally guilty. *Kelynge* 31.

Except in Murder.

How one who pretends to be Wife to a Felon shall be indicted.

At the Sessions in the *Old-Baily*, Anno 1664. one *Jane Jones*, together with one *Thomas Wharton*, were indicted for Burglary, and she pleaded that she was marry'd to *Wharton*, and refus'd to plead by the Name of *Jones*; whereupon the Court, with Consent of the Jury who found the Indictment, alter'd the Indictment in their Presence, made it *Jane Wharton, alias Jones, Spinster*, (and did not call her *Jane Wharton, the Wife of Thomas Wharton*). But the Court inform'd her, that if upon her Trial she could prove she was marry'd to *Wharton* before the Burglary, she should have the Advantage of it: But she could not, and so was found guilty, and had Judgment. *Kel.* 37.

A Feme Covert shall not be deem'd accessory to a Felony for receiving her Husband, who has been guilty of it; but the Husband will be deem'd accessory for receiving his Wife after she has committed Felony. 3 *Inst.* 108. Nor will the Wife be guilty of High Treason by receiving and concealing her Husband after he has committed Treason.

Wife not obliged to discover her Husband, who has committed Treason or Felony. Otherwise if the Husband receive her.

By the 3 & 4 *W. & M. cap. 9.* it is enacted, That if a Woman shall be convicted of any Offence, for which a Man might have the Benefit of his Clergy, upon her Prayer to have the Benefit of that Act, Judgment of Death should not be given against her, but she should suffer the same Punishment that a Man should suffer in the like Case, *viz.* be burnt in the Hand, and kept in Prison, not exceeding one Year.

Women to have the Benefit of the Clergy as well as Men.

C H A P. XXVI.

Joinder in Action.

Where and in what Actions Baron and Feme shall join, and where and in what Actions not. In what Cases the Husband only shall have the Action. Diversity between an Action which affirms Property, and which disaffirms Property. Four general Rules of the Baron and Feme's Joinder in Action, and Cases under each to direct where Baron and Feme must join in the Action, or it may be brought by the Husband only. Particular Actions, as Trover, Indebitatus Assumpsit, Account, Formedon, Ejectione Firmæ, Actions for Rent, Rescous, Actions for Tithes, Covenant, Waste, Debt on Bond or Contract, Trespass, Battery, Escape, Action on the Case sur Assumpsit, Actions on the Case for Torts, Forcible Entry, Writ of Error, &c. and the Manner of declaring in such Actions. Of Actions brought by a Feme Covert against a Feme Covert. In what Cases a Feme Covert is enabled to sue without her Husband. Of a Feme Sole Merchant.

Where and in what Actions Baron and Feme shall join, and where and in what not.

I Shall consider,

1. In what Cases the Husband only shall have the Action.
2. In what Cases Baron and Feme must join.
3. Where the Husband may join his Wife with him or not, at Election.

In what Cases the Husband only shall have the Action.

There is a Diversity between Actions which Regula. affirm Property, as Replevin, Detinue, &c. for Diversity be- those ought to be brought in the Name of the between Actions Husband only, because the Property is affirm- which affirm ed; and Actions which disaffirm Property, as Property, or disaffirm it. Trespass, Trover, &c. for these ought to be Trover. brought in both their Names, because they are founded in Tort made before Coverture, Sid. 172. *Pewis and Marshal*; therefore Trover and Conversion by Baron and Feme, for Trover supposed before the Coverture, and Conversion afterwards. Though two Justices in that Case were of Opinion, that the Action ought to be brought by the Baron alone, because the Cause of Action is after the Conversion, and subsequent to the Marriage. *Beaumont and Grave's Case*. If Trover be laid to her before the Marriage, which was the Inception of the Cause of Action, the Wife may be joined; *aliter*, if the Conversion be laid after the Marriage. In the first Case, the Husband may bring the Action alone, or jointly with the Wife. If one hath the Custody of a Woman's Goods, and afterwards marries her, she may join in Detinue with her Husband, for his Use in Bailment; the Proprietor is to some Purposes in Possession, and to other Purposes out of Possession. 1 *Vent.* 261. 3 *Keb.* 329. Trover, after Of Goods lost before or after the Marriage, is well brought by Baron and Feme, as the Marriage. on Bailment of Goods before Marriage; they are in Possession as to Trespass, or out as to Detinue; to some Purposes this is but as a Thing in

in Action, and the Property not alter'd by Marriage.

Baron and Feme Executrix bring Trover for Goods of the Testator found and converted, it is well brought; for the Possession of the Wife as Executrix, is also the Possession of the Husband; and the Damages recover'd shall be to the Estate of the Testator, and so may concern them both. *Style, p. 48. Fremling's Case.*

*Of the Goods
of the Wife
dum sola.*

Shuttleworth and his Wife brought Trover and Conversion, and count that they were the Goods of the Wife *dum sola fuit*, and that she lost them, and the Defendant found them, and after they intermarry; and after the Defendant converted them: And it was adjudg'd against the Plaintiff, because notwithstanding the Trover of the Defendant, this Property continued in the Wife; and then by the Intermarriage the Property was in the Baron, and then the Baron ought to have brought this Action alone, without the Wife. Cited 1 *Roll. Rep.* 45.

*For Money lost
by the Wife at
Cards.*

Trin. 6 Jac. Rot. 1717. *Ray and Stephens*; Action of Trover by the Husband for Money which the Wife had lost at Cards, and Judgment was for him, tho' she plaid in his Absence; yet he may have Action for the Money won by her.

Replevin.

If the Goods of a Woman are taken, and the Man after marries, the Husband sole shall have Replevin. *Fitz. Rep.* 43.

Regula.

In all Cases where the Wife shall not have the Thing when it is recover'd, neither sole to herself, nor joint with her Husband, but the Husband only shall have it, there the Husband sole shall have Action, without the Wife, to recover it: As the Husband shall have Action sole *per Stat. 5 R. 2.* for entring into the Lands of the Wife. 38 *H. 6.* 3.

He shall have a *Quare Impedit* sole, 38 H. 6. 3. b. So in Trespas for taking the Charters of the Inheritance of the Wife. 38 H. 6. 4.

Baron shall have Trespas sole for Trespas on the Land of the Wife. 38 H. 6. 3.

The Husband sole shall have an Action for *Words*. Words spoken against his Wife; and if the Wife be join'd with him, Judgment shall be arrested. Sid. 346. But they must be such Words which are only actionable in respect of collateral Damages.

Baron and Feme may not bring Trespas of Assault and Battery of the Wife, but the Husband ought to bring the Action alone; because whatever Damages should be recover'd, would go to the Husband only. Style, p. 52.

This Rule is in 3 Bulst. 163. *Bret and Cumberland*: It is a good and sound Rule, That which the Husband may discharge alone, and of which he may make Disposition to his own Use, and where the Husband may have the sole Profit of that which is recover'd; for the Recovery of this, he may have an Action in his own Name, without his Wife, as Covenant. *Vide infra*. Regula.

For personal Things, Baron and Feme cannot join: But for personal Things in Action, it is in the Election of the Husband to join his Wife, or not. And upon a Judgment given in Trespas by Baron and Feme, of their Close broken, and Corn carry'd away, it was reversed. Cro. Eliz. 153. *Arundel and Short*: So is the Rule in *March*. Regula.

Where Baron and Feme sue for personal Things done to them, they shall not join; but where they have a joint Interest, as in Case *Quare Impedit*, they shall join. *March* 47. Regula.

Regula.

Actions for Torts, which survive to the Wife after the Death of the Husband, the Wife shall join, and in no other Case. Baron and Feme bring Trespass for the Battery of the Wife, and tearing the Wife's Coat, *ad damnum ipsorum*. Per Curiam: The Action, as to the Tearing of the Coat, ought to be in the Name of the Baron only; for it is the Goods of the Baron; and this had special Damages found by itself; and then it is *ad damnum ipsorum*, which ought not to be. Sid. 224. Staunton and Ux. Vide Hobart.

The Husband cannot bring an Action in his own Name for Money received to his Wife's Use as Executrix.

Money was paid to the Defendant for the Plaintiff's Wife, as she was Executrix. The Plaintiff brought an Action on the Case against the Person who receiv'd it as for Money had and receiv'd to his Use, and he was nonsuited, for it ought to have been brought by the Husband and the Wife jointly: But had the Money been receiv'd by an Authority from the Husband, the Action might well have been brought in his Name alone. *Salk. Rep. 282.*

Action of Battery brought by the Husband against one who was guilty of Adultery with his Wife, and a Prosecution in the Spiritual Court for the same Fact.

If a Person commit Adultery with another Man's Wife by her Consent, and there be no actual Force used, yet the Husband may maintain an Action of Assault and Battery against the Adulterer, and also prosecute him in the Spiritual Court for the same Fact: But an Indictment will not lie for such an Assault and Battery where the Wife consented, nor may the Wife join with the Husband in the Action. And it was also held, that a Person is not punishable in the Spiritual Court for a Solicitation of Chastity where Force is actually used, because Force makes the Crime of Temporal Concubance. 6

Mod. 72.

Where

Where a Man is taken in Adultery with another Man's Wife, if the Husband shall stab the Adulterer, or beat out his Brains, he is guilty but of Manslaughter in the Eye of the Law, *Kel. 137.*

Husband kills the Adulterer in the Act, but Manslaughter

The Husband brought an Action against his Wife's Father for detaining her from him; the Defendant suggested, that the Marriage was contested in the Court Christian, and therefore mov'd the Trial might be put off till that Matter was determin'd; but the Court deny'd to stay Proceedings. *1 Vent. 37.*

Action against his Wife's Father for keeping her from him.

Ward brought an Action against *Rich de uxore abducta*, and keeping her from him *usque* such a Day, which was some Time before the Exhibiting the Bill, and concluded *contra formam Statuti*: After Verdict for the Plaintiff, upon Motion in Arrest of Judgment, the Declaration was held good, notwithstanding the impertinent Conclusion of *contra formam Statuti*, altho' there be no such Statute: But the Judgment was stay'd, for that it shall be intended the Jury gave Damages for the whole Time mention'd in the Declaration. *1 Vent. 104.*

Action for taking away his Wife, and keeping her from him.

In all Cases, so long as the first Contract, or *Régale*. Specialty made to the Wife *dum sola*, continues, she shall join; for as much as if she die, the Baron shall not have Action for it, but as Administrator to her. And therefore in Action on the Case *sur Assumpsit*, the Plaintiff declares that the Defendant being in Debt to the Wife of the Plaintiff *dum sola*, he assum'd to pay the Plaintiff; and he further declares, that he being in Debt to the Wife of the Plaintiff, &c. in other Sums, he accounted with the Plaintiff, and was found in Arrears so much, which he promis'd to pay: And after Verdict *pro Quer'*, Judgment was arrested *causa qua supra*; but if the Hus-

band declare, that the Defendant accounted with him for Money due to the Wife *dum sola fuit*, and was found in Arrear, which he assum'd to pay; and in Consideration also that the Plaintiff would forbear until such a Time, he assum'd to pay: In the first Case, it is ill after Verdict, because the first Contract continues, and the Wife ought to be join'd; but in the second Case, the Action is founded upon a new Contract, which changeth the first by the Consideration of Forbearance, and therefore in that Case the Action is well brought by the Baron sole. *Sid. 299. Tyrrel and Bennet.*

Account alters not the Nature of the Action of Indebit' Assumpsit; but if the Jury find a special Promise, Qu.

L. (the Plaintiff) marry'd a Feme to whom Money was due *dum sola fuit*, and the Husband and the Debtor came to Account for the Money. The Debtor being found in Arrear, promiset to pay the Money, due upon the Account, to the Husband at a certain Day; and for not performing his Promise, Plaintiff brought Action on *Indebitat' Assumpsit*. *Per Glyn, C. J.* It is true, the Account alters not the Nature of the Action, but here the Verdict finds there was a special Promise made to pay the Money to the Husband; and here is a distinct Day set for the Payment of the Money, and the Consideration is good; for here is a Debt due to the Husband, and he may release it: And the Doubt made by the Jury is, Whether the Action be well brought by the Husband alone? Here is a Promise made to the Husband, and he hath brought the Action as if the Defendant were indebted to him; yet he is not indebted to him generally, but *sub modo*, (*viz. jure uxoris*); but it was not resolved, because the Writ of Error was ill. *Style's Rep. 473. Coney and Lawes.*

IF

- If *A.* conveys Land to *B.* in Fee by Indenture, *Covenant.* and covenants with him, his Heirs and Assigns, to make any other Assurance of it upon Request, for the better Settlement to *B.* his Heirs and Assigns; and after *B.* conveys this to *C.* in Fee, who conveys this to *D.* and his Wife, and the Heirs of *D.* and after *D.* requires of *A.* another Assurance, according to the Covenant, and he refuseth; the Baron sole, without the Feme, may not have Action of Covenant as Assignee to *B.* because he and his Wife are Assignees, and therefore ought to join in the Action. *P. 14. Car. B. R. Midlemore and Goodale, Cro. Car. 505.*

But in most other Cases out of the foregoing Rules, the Baron may join the Wife with him or not at Election.

But for the fuller Illustration of this Subject, (wherein our Books seem to vary) I shall treat of the particular Actions brought by Baron, or Baron and Feme; and shew how the same are laid, and the Pleadings thereupon.

And first of Actions which are real, or favour of Realty.

Formedon in Reverter brought by Baron and Feme, the Writ must conclude to the Feme only: The Case was; *Robert, Earl of Essex,* and *Frances* his then Wife, by Fine gave Lands to *W. G.* and *F. M.* and the Heirs of the said *W.* to the Use of *Eliz. Sidney*, Daughter and Heir of *Sir Philip Sidney*, Knight; and for Default of such Issue, to the Use of the said Lady *Frances*, and her Heirs; *Et quæ post mortem prædⁱ Eliz. ad præfat^{am} Franciscam revertere debent per formam donationis prædⁱ ac vigore Stat. Et eo quod præd^a Elizabetha obiit sine hærede de corpore suo exeun^t;* And the Earl and Countess counted accordingly:

ingly : The Defendant Viscount *Lisle* pleaded in Abatement of the Writ, that the said Countess, at the Time of the Death of the said *Elizabeth*, was Covert of the Plaintiff her now Husband ; so that the Right of the said Tenements, *scilicet* *quid*, &c. to her Husband and her, did revert ; and so by the said Writ it ought to be supposed : Demandant demurs ; and Judgment was, That the Writ was sufficient. The Differences are fine : If it were a *Formedon* in Descender upon a Descent to the Wife, there the Descent in the Writ must be made to the Wife alone ; for the Descent follows the Blood, and to that the Baron is a Stranger. But in a *Formedon* in a Reverter, wherein already nothing is invested, but the Right only returns ; there it may be laid to return either to the Wife alone, or to the Baron and Feme.

But in a *Cessavit* by Baron and Feme, or a Writ of *Escheat*, or a *Consimili casu*, or Action of Waste, because there is vested in them a Seigniorship or a Reversion actually, and the Land holden, or the present Estate to return, is to come in Possession ; in these Cases the Reverter is to be made to them both. *E. Claurickard, Hob. 1, 2.*

If a Disseisin be made upon Baron and Feme in the Lands of the Feme, in Action brought to recover this Land again, the Baron and Feme must join. *1 Bulst. 21.*

Assise.

If a Feme recover in Assise, and after take Baron, and they are re-disseised, the Baron and Feme shall have a Re-disseisin, because the Husband joineth for Conformity, and it is in the Right of the Wife, who was disseised before, *1 Inst. 154. b.* though the Statute saith *Idem Disseisitores*.

W. and

W. and *M.* his Wife, were disseised of the Land he held *in jure uxoris*, and dispossess'd of his Goods; in Assise *port* by Baron and Feme, Judgment was given for them both, *damna pro disseisina* 100 *l.* and *pro bonis* 100 Marks; Judgment was reversed for the 100 Marks, because the Wife had nothing in them. 2 *Inst.* 136.

In *Quare Impedit* Baron and Feme shall join, *Q. Impedit.* and yet the Avoidance goes to the Executors of the Baron. *Lit. Rep.* 285.

In *Ejectione Firme*, and Ravishment of Ward, *Ejectione Firme.* the Wife shall join. *Lit. Rep.* 285.

A Legacy was given to a Feme Covert; the Husband alone exhibited a Bill for it; to which there was a Demurrer, because the Wife was not made a Party; and the Demurrer was allow'd; for of Things merely in Action belonging to the Wife, as a Bond, &c. she ought to join in Suit; *Secus* of a Rent running in the Wife's Right after Marriage; for if the Husband alone should sue, and be dismissed, that will not conclude the Case; and if he die before Judgment or Decree, the Wife cannot revive the Suit. *Trin.* 14 *Car.* 2. between *Clerk* and Lord *Angier*, 1 *Chan. Ca.* 41.

A Feme Covert, who has a separate Maintenance, may sue without her Husband; resolved upon Demurrer. 1 *Chan. Ca.* 35.

A Wife, whose Husband is banished by Act of Parliament, may act in every Thing as a Feme-Sole. 2 *Vern.* 104.

If a Husband and Wife exhibit a Bill for a Demand in Right of the Wife, the Defendants answer, Witnesses are examin'd, and Publication passes, and the Husband dies, and the Wife marries a second Husband; if they bring a New Bill, they may examine again the same Witnesses as were examined in the former Cause.

2 *Vern.* 197. but *vide* 2 *Vern.* 249. *cont'*; tho' held that it might be otherwise, if the Demand had been of the Wife's Inheritance.

Pur Rent. Vide Avowry.

In Avowry for Rent in the Right of the Wife, they ought to join, 4 *H. 6.* 14. as if Rent be due to the Wife before Coverture, she and her Husband must join in the Avowry.

In Replevin the Defendant avows, because his Ancestor was seised in Fee, and let the Land *in qua, &c.* for Years, rendring Rent, and for Rent due to him and his Wife in Right of his Wife, he avows the Taking; after Verdict for the Avowant, Exception was taken, because the Baron sole avows, and doth not join the Wife with him; whereas it appears the Rent is due to him and his Wife, and he ought not to avow in his own Name only: But *per Curiam*, Because he shews the Truth of the Matter what it is, and doth aver the Life of the Wife, and so the Distress well taken by him, and the Rent due to him, it was adjudged that the Avowry was good enough. *Cro. Jac.* 442. *Wife and Bellem.*

.. Note; *Rent is as a Chose in Action.* If a Man doth marry a Wife which hath a Rent, if the Wife dies before the Husband hath recover'd it, he can have no Remedy to recover it after the Death of the Wife; for it is merely a Thing in Action, and of the same Nature as an Obligation which is made by a Feme Sole, who takes Husband, and dies. 1 *Bulst.* 132.

Vide

Vide Rescous.

In Replevin, the Husband avows sole for Rent Arrear to the Wife *dum sola*: It is well enough; if the Wife were made the Defendant, there they must both avow. 2 Cro. Jac. 3. 3 Keb. 647. Duke of Albemarle and Cutler. *Acceſſory by the Husband Sole.*

The Husband distrain'd for a Rent-Charge in Fee, granted to his Wife for Arrears *durante viduitate* of the Wife, and upon *Rescous* he brought the Action alone, and good; or at his Election he might have joined his Wife with him. Cro. Eliz. 459. Fenner's Case.

For Tithes.

Action of Debt upon the Statute of 2 Ed. 6. *Tithes.* by Baron and Feme for not setting forth of Tithes; the Baron and Feme may join, if the Baron be seised in Possession of the Rectory in the Right of the Wife, or in Jointure; and upon Writ of Error Judgment was affirmed. Moor 912. Wentworth and Crisp: So Cro. Eliz. 608, 613. Baron and Feme possess in the Right of the Wife as a Termor, they may join because the Wife is Proprietor, and the Action is given to the Proprietor or Termor.

An unmarried Woman being Proprietor of a Parsonage took Husband, the Husband may not sue for the treble Damages on the 2 Ed. 6. without his Wife; for the Baron is not intended Proprietor as the Statute intends, but the Wife. 2 Brownl. 9. Ford and Pomeroy's Case. *Proprietor.*

Covenant.

Covenant.

A. covenants with *B.* and his Assigns, for further Assurance; *B.* assigns to Baron and Feme; they must join in the Action of Covenant. Vide *supra*, *Middlemore and Goodale's Case*.

Baron alone may bring Covenant real on a Breach during Coverture, of a Covenant made to the Wife *dum sola*. 1 *Keb.* 20.

Debt for Rent
by the Baron
after the
Term.

Lease for Years was made to *B.* Defendant, rendering Rent, afterwards the Reversion of this was granted to the Plaintiff and his Wife; the Tenant for Years attorns, the Term ended, and for Rent Arrear the Baron brought Action of Debt alone. It is agreed, had the Term continued, he ought to have joined his Wife with him. And *per Curiam*, The Action of Debt is well brought here, in respect of the Nature of the Thing by him to be recovered, which is as a Sum in gross, and the Thing to be recovered is the Rent which the Baron alone is to have: The Action generally brought is good; but had the Husband brought the Action as Assignee, by Assignment made to him alone; whereas the Reversion was granted to him and his Wife jointly, that had not been good. 2.

Avowry.

Bulst. 234. *North and Wyard.* 1 *Roll. Rep.* 51. *Mesme Case*. In Replevin, Avowry is made for Rent due to the Baron and Feme, and it appears that Part was due to the Wife before Marriage, and *a retro fore dum sola fuit*; and this had been the surest Way: But *per Curiam*, It is good enough; but the pleading the Avowry as made by them both, is good in Law; in as much as the whole Rent is now due to them both; for the Rent was due to the Wife *dum sola fuit*, and so the same continued at the

the Time of the Marriage, and now by Marriage this is also made the Debt of the Baron, and the same by Marriage is due to him as well as to the Wife. 1 *Bulst.* 136, 137. *Bowles and Peeres.*

It is said in 1 *Keb.* 712. the Defendant avows by Devise of Rent to Jane Doe, who marries: Judgment was for the Avowant, notwithstanding the Avowry be *in jure uxoris*, and the Wife no Party; for unless she be made a Defendant in the Replevin, she need not be Party in the Avowry. *Osborne and Whittington's Case*, and 2 *Cro. Wife and Bellent's Case* cited. *Where the Wife is no Party in the Avowry.*

If a Lease be made by Baron and Feme of the Wife's Land, rendring Rent, the Baron may bring an Action alone for the Rent; and *quare* if they may join. 2 *Bulst.* 21. *By Baron alone.*

Reversion granted to Baron and Feme, and to the Heirs of the Husband, there is a Lease in Being, and Covenant that the Lessee shall repair; for not repairing, the Plaintiff brings this Action without his Wife, whereas the Feme hath an Estate therein as well as the Baron. *Sed per Curiam*, The Action being personal, and Damages only to be recovered, the Baron may have the Action solely, or join the Wife if he please. *Cro. Jac.* 399. *Sir J. Bell and Cumberland.* On Statutes,

Baron and Feme joined in Action on the Statute of Labourers, and the Writ abated.

On the Stat. 2 *Ed.* 6. of Tithes; *Vid. supra.*

Debt was brought by B. and his Wife, against E. for Arrears of Rent upon a Lease for Years made by the Feme, and her first Husband, to the Defendant, by Indenture. The Defendant pleads, That the Ancestor of the first Husband was seised in Fee, and that it descended to the first Husband, and he was sole seised; *Debt for Rent.*
and *Pledge.*

One Deed cannot enure from one by way of Interest, and from another by way of Estoppel where both join.

and so the Feme had nothing at the Time of the Lease made. The Plaintiff demurs: *Per Curiam*, The Plea is good. It is true, when two join in a Fine or Matter of Record, he who accepts of them is concluded to say that both gave it; but where it is by Deed, it is otherwise, for that cannot enure from one by way of Interest, and from the other by way of Estoppel, for one Deed cannot enure to two Interests: Also when two join in a Deed, and the one only hath the Interest, it enures by way of Confirmation from the other, and not by way of Estoppel. But here this can neither be by way of Estoppel, nor a Confirmation; for the Deed is utterly void as to the Feme, she being Covert, and it cannot be an Estoppel, because an Estoppel ought to be mutual on both Parts, and the Deed of a Feme Covert cannot estop her. *Cro. El. 700, 701. Brereton and Evans.*

Q. Elizabeth made a Lease of certain Mills for 31 Years to *W. Cumberland*, with Covenant to repair; the Reversion comes to the King, who did grant this to Sir *John Brett*, and his Wife; and for the Breach of the Covenant in the Letters Patent, for not repairing the Mills, the Husband alone brings the Action. And *per Curiam*, It is well brought, and he might have joined the Wife with him, if he would. 3 *Bulst.* 162. *Brett and Cumberland.*

Baron and Feme join in a Covenant, and the Action was brought against them both, and it abated because it shall charge the Husband only. 24 *E. 3.* 38.

S. and his Wife seised of Land to them and the Heirs of the Baron, let by Indenture to the Defendant; wherein he covenants with him, and with the Heirs and Assigns of the Baron,

to

to repair; Husband and Wife conveyed the Reversion to the Plaintiff, who was Covert, and concludes his Declaration *per quod actio ei accrevit*, as Assignee of the Husband, and avers not the Wife to be dead; yet good because it is brought by the Assignee of him who had the Inheritance, and the Estate for Life being transferred in Fee is drowned. *Cro. Car.* 285. *Major and Taber.*

Waste.

Lease for Life is made to one, the Remainder *Waste.* to Baron and Feme, and to the Heirs of the Baron: Baron and Feme may join in Action of Waste. 17 *Ed.* 3. 7. So if Baron and Feme during the Coverture make a Lease, and Waste is committed.

Error of a Judgment in Waste against Tenant for Years brought by Baron and Feme, of a Moiety, being seised in Reversion to them and his Heirs *ad Exheredationem* of them. *Per Curiam*: They must join in the Action, but the Conclusion must be *ad Exheredationem* of him; but the Original not being certified, it is well enough. 2. Damages are given to the Baron and Feme. Which *per Cur'* is ill, and should have been amended in Bill; but now it is too late, and Judgment was reversed. 3. *Keb.* 125. *Curtis and Bourne.*

In a Writ *port* by Baron and Feme upon a Lease by the Wife, for her own Life, before the Coverture, the Court shall suppose *ad Exheredationem* of the Wife, for she had the Reversion; and shall enter for the Forfeiture. 42 *Ed.* 3. 18.

So if Baron and Feme bring a Writ of Waste for the Inheritance of the Wife, the Writ ought

ought to be *ad Exharedat'* of the Wife; for if it be *ad Exharedationem* of the Baron and Feme, the Writ shall abate. 8 H. 6. 9.

In Action of Waste in the Tenuit he is to join the Wife with him, because this is in the Realty, and the *Locum vastatum* is also there to be recovered.

Debt on Bond.

Obligation made to a Feme sole, who takes Husband, and dies, living the Baron; he shall not have the Obligation, nor any means now to recover the same Money due upon it; for this is a Thing in Action, the Benefit whereof cannot be had but as in the Right of the Wife, which is now lost by her Death. 1 Bulst. 137. Bowles and Poore's Case. Noy 149. Style 208. but he may administer and have it.

Pleads.

If a Bond be made to a Feme Covert, and the Husband disagree, the Obligor may plead *non est factum*, for by his Disagreement the Obligation is no Deed. 10 Rep. 119. Whelpdale's Case.

*Ad damnum
ipforum.*

Debt by Baron and Feme upon a Bond made to the Wife *dum sola*, *ad damnum ipforum*, and good; and it is the usual way in such Actions to declare so, and the Money due upon the Obligation not being paid to the Wife while she was sole, it was a Damage to her; and now being Covert, it is a Damage to the Baron also, and so it is *ad damnum ipforum*. Style 134.

If a Bond be made to Baron and Feme, the Baron alone for this may have an Action of Debt. 3 Bulst. 163.

Action of Debt on Bond to the Wife *dum sola*, brought by the Husband only without her, is not good: For if Cause of Action arise before Coverture, though but Trespas, where only Damages are recoverable, they must join; so in *Indebitatus* on Money due from the Wife *dum sola*, on Account being brought against him alone, Judgment was reversed. 1. *Keb.* 140. *Hardy and Robinson.*

Debt on Bond to the Wife dum sola, they must join.

Debt for Debt, Damages and Costs, recovered by B. and his Wife, *modo superstitite*, against the Defendant; and because the Wife was not named in the Action, the Defendant demurred, but the Action well lay; *per Cur'.* *Cro. Eliz.* 844. *Butler and Delt.*

A. makes a Bond to Baron and Feme, Baron dies, the Wife administers, and brings Debt on the Bond as Administratrix; she dies before Judgment, and her Executor brought Debt upon that Obligation. It lies not. It was in her a sufficient Election and Waiver, and that personal Duty being a *Chose in Action* may well lie in Jointure between Baron and Feme. *Noy* 149. *Norton and Glover.*

Obligation made to Baron and Feme, the better Opinion is, that the Baron may bring the Action on this Obligation alone in his own Name, or he may join the Wife at Election. *Style, p. 9.*

Joinder or not, at Election.

Debt on Account.

Baron and Feme assign Auditors to the Receiver of the Feme before Coverture, and found in Arrearages; they ought to join in Debt upon this, for the Debt was before the Coverture, and it was but put in certain by the Auditors. 15 *H.* 4. 9.

Debt

Debt lies by the Baron only for Debt, Damages and Costs, recover'd by the Plaintiff and his Wife, *modo superstitute*. Cro. Eliz. 844.

Judgment.

Debt on Bond to P. and K. ux. ejus, made to the said K. *dum sola fuit*, and Verdict and Damages assessed to Baron and Feme *ratione detentionis debit'*, and good; for the Damages shall be to both. Cro. Eliz. 259. Gurney and Ux. versus Sir Ed. Cleave.

On real Contract.

Baron alone may bring Debt upon a real Contract made to the Wife *dum sola fuit*, and broken during Coverture. 1 Keb. 20.

Scire fac' upon a Judgment recovered by Baron and Feme, brought by the Baron only.

If Baron and Feme bring Action of Debt for Debt due to the Wife, and recover, the Feme dies, the Baron may bring a *Scire fac'* to execute this Judgment; for the Debt being recover'd, the Baron, after the Death of the Wife, shall have it; but if the Feme be Administratrix to her former Husband, and Baron and Feme bring Debt upon a Bond due to the Intestate, and had Judgment to recover the Debt and Damages, and Feme dies, and after Year and Day past, the Baron brings a *Scire fac'* to have Execution, it lies not, because it was a Debt demanded by the Wife *en auter droit*; and though they recover, yet she dying before Execution, the Debt remains to him who takes Administration in Right of the Intestate; and although the Baron be Party to the Judgment, yet he hath no Property in the Debt, and he who ought to have the *Scire fac'* must have Privy and Property to have the Debt. Cro. Car. 208. Beaumont and Long. Vide p.

For Award Money.

If Award be made that 7 l. shall be paid to a Feme Covert, and 13 l. to the Husband, the Husband sole shall have an Action for all the Money, because it is a Thing as comes in the

Cover-

Coverture; as if Baron and Feme make a Lease, reserving Rent, the Baron sole shall have Action for the Rent Arrear. If the next Avoidance be granted to Baron and Feme, the Baron sole shall have it. *Lit. Rep.* 13.

Trespass. Battery.

Baron and Feme bring Action of Battery for the Beating of him and his Wife: The Writ shall abate, because the Wife cannot join for the Battery of the Baron; and the Baron cannot have Judgment alone, because the Wife is joined with him in the Original: But the Baron and Feme shall have Judgment for the Battery of the Wife, for this is but one Judgment. 1 *Roll. Abr.* 782.

Baron and Feme brought Action for the Beating of the Wife, and *ad damnum ipsorum*; it is good, because it is such an Action as may survive to her alone, and cannot be otherwise. *Sid.* 387. *Horton and Ux. versus Byles.*

Trespass of Battery by Baron and Feme, and *Declarations* Verdict: It was moved in Arrest of Judgment, that the Declaration was by Baron and Feme for an Assault and Battery made to the Wife, and they also declare that the Defendant *alia enormia eis intulit*, which ought not to be, but *ei intulit*; for the Wrong being a personal Wrong done to the Person of the Wife only, cannot be said to be done to the Baron; to which the Court agreed. *Style, p. 236. Watts and his Wife versus Lord*; but *Cro. Jac.* 664. *Tomlin's Case contra*, because it is but Form, and the Baron may have Wrong by his Wife's Battery; and so (*eis*) is good.

Trespass of Assault and Battery by Baron and *Declaration.* Feme, and taking of an Horse; and the Decla-
Z
ration

ration is *ad damnum ipsorum*. *Per Curiam*: The Baron and Feme cannot join in this Action, but ought to bring several Actions, for the Wrong done to each was several. *Style* 130. *Stradling and his Wife versus Boreman*.

Verdict was,
so much Dam-
ages for
beating the
Husband, and
so much for
beating the
Wife.

Baron and Feme brought Trespass and Battery for beating them both; upon *Not guilty* pleaded, the Verdict was for so much Damages for beating the Baron, and so much for beating the Wife: On Motion to arrest Judgment, the Court said the Plaintiff might release Damages for beating of himself, and take Judgment for the other. *1 Vent.* 328.

Verdict.

Trespass of Assault, Battery, and Wounding the Husband and Wife; on *Not guilty*, the Verdict was, as to the Wife guilty, & *quoad resid.* not guilty. It was moved, that Baron and Feme could not join in an Action for beating them both. *Cro. Jac.* 355, 655. 2. That there is nothing found as to the Beating the Husband, and so it is an imperfect Verdict, & *quoad residuum* shall extend only to the other Trespasses as to Wife. *Yelv.* 106. *Per Curiam*: The Verdict hath cured this Mistake in the Action. *Style* 349. *2 Vent.* 29. *Hooker's Case*.

Declaration.

Now the Case in *Cro. Jac.* is, Trespass by Baron and Feme for Battery done to them both, and found for the Defendant, and certified he did it as Constable, and double Costs prayed, by *Stat. 7 Jac. cap. 5*. It was moved that the Declaration was ill, because Baron and Feme cannot join in Battery done to them both; and therefore Judgment ought to have been given against the Plaintiff on the Declaration, and not upon the Verdict, and so no Costs. But *per Curiam*: Because the Defendant was found not guilty, and what he did was as Officer, the Plaintiffs shall not take Advantage of

of the Insufficiency of the Declaration or Writ to excuse themselves. *Cro. Jac. 175. Heydon's Case.*

Baron brought Action of Trespas for beating him, *necnon* for beating his Wife, *per quod consortium, &c. amisit.* It was moved that the Plaintiff ought not to join the Battery done to the Wife, in the Action with the Battery done to himself; and therefore he ought to have joined his Wife with him in the Action. But *per Cur'*: It is well brought; for the Action is not brought in respect of the Harm done to the Wife, but for the particular Loss of the Baron, for the Loss of the Company of the Wife, which is a particular Loss to himself, as the Master for his Servant. And *Cholmley's Case* was, Action was brought for the Battery of his Wife, *per quod negotia sua infecta remanserunt*, and had Judgment to recover. *Cro. Jac. 105. Guy and Lawson. 2 Roll. Rep. 51. Mesme Case.*

*Declaration,
Per quod
consortium
amisit.*

Trespas, that the Defendant made Assault on the Plaintiff's Wife, and *eam verberavit & male tractavit*, *necnon* the said *Eliz. cum* one Gown, one Petticoat, of the Goods of the Plaintiff, *simul cum* the said *Eliz. apud D. cepit abcarriavit & detinuit*; and *per quod solamen & consortium, &c. amisit.* On *non culp. Verdict pro Quer'*, it was assigned for Error, because the Action was brought by the Baron sole for the Battery of the Wife, which ought not to be; for the Tort and Damage is properly done to the Wife, and therefore the Husband sole shall not sue; and if the Wife survive the Husband, she shall have the Damage, and then the Damage being intirely given, the Judgment is erroneous. *Per Curiam*: The Action is not here brought for the Battery of the Wife,

Declaration.

An Action for
Battery,
whereof she
died.

Ad damnum
ipsorum.

Action for Bat-
tery of the
Wife, and
taking from
her an Apron.

but for the Loss of the Husband for want of her Company and Aid; and all is concluded with the *per quod*, and which extends to all that went before. Cro. Jac. 538. Hyde and Scissor. The like Case, *per quod solamen*, &c. Cro. Car. 89. Young and Pridd. But Telv. 89. is, that Baron sole shall not have Action for Loss of Service by beating his Wife, for Damages shall be given to the Wife for Tort offered to her Body. The Plaintiff declared for assaulting his Wife, of which she died, is not good; this being a personal Tort to the Wife, is now dead with the Wife, and it is now become an Offence to the Crown, and drowns the particular Wrong. Telv. 89. Higgins and Butcher. 2 Inst. 434.

Trespas of Assault, Battery and Imprisonment of the Wife, until the Husband paid 10 l. *ad damnum ipsorum*, it is well enough. 2 Keb. 188, 230. Browne and Tripp.

Battery brought by the Husband for the Beating of the Wife *ad damnum ipsorum*, it is ill on general Verdict *pro Quer*, and for the Battery of him she cannot join; but if the Jury had found the Battery or Damages several, it might be otherwise. 2 Keb. 269. Jones and Aloff.

So is Dunoill and Mascall's Case. 2 Keb. 813. In Trespas by Baron and Feme for beating the Wife, and taking away from her an Apron, &c. and Verdict *pro Quer* general. It was moved in Arrest of Judgment, that the Wife cannot join as to the Goods, and Judgment was stayed *per Curiam*, unless there had been several Pleas, and several Damages. 3 Keb. 813.

Note; Where the Action and Damages do survive, the Conclusion shall be *ad damnum ipsorum*, as in Action for Battery of the Wife; but in Action for beating the Baron and Feme, they

they cannot join nor conclude so. 2 Keb. 434. Verdict.

Atwood and Parnes's Case.

Assault by Baron and Feme for beating Baron and Feme, they were found guilty of beating the Wife only, and nothing was found concerning the Battery of the Baron. *Per Curiam*: If not guilty had been found as to the Baron, it had been well; but here is a *non Liqueat* as to him. 10 Co. 130. b. and it is a void Verdict, Part of the Issue being only found. 1 Inst. 227. and here is no Discontinuance, the whole being continued; and *Venire de novo* awarded. Hardr. 166, *Rochel's Case*.

Of Trespasses done to the Estate and Freehold of the Wife.

Trespass by Baron and Feme, *quare clausum fregit*. *Per Curiam*: They may well join in this Action; so they shall join in a *Quare Impedit*; and so in Action of Trespass for cutting down of Trees; and in the principal Case, it shall be taken by Intendment that they are Jointenants. 1 Bulst. 110. *Maynard and Towe*.

2 Vent. 195. Trespass *quare clausum fregit* by Baron and Feme: *Pollexfen*, Chief Justice, was of Opinion, that the Wife ought to be joined with him, tho' it was her Land: *Ventris contra*, The Action will survive, and they have Election to join or to bring it alone. 1 Brownl. 21. 1 Roll. Abr. 348. Hob. 180. 1 Cro. 96. 3 Cro. 306. *Trignel and Reeve*, *Bright and Addis's Case*.

Trespass by Baron and Feme for entring up on the Wife's Land. and *herbam ipsius Thomæ & Annæ adiunc* & *ibid. crescen' messuit* & *succidit* & *in fœnum composuit*, & *20 carucat' inde provenien'*, &c. It was objected that this Action doth

Quare clausum fregit & herbam ipsius T. & Ux' ejus messuit, &c.

doth not lie for Baron and Feme for the 20 Loads of Hay taken, for it is a Chattel severed from the Inheritance, and vested in the Husband. *Per Curiam* : They may well join ; as they may join in Trespass *de clauso fracto*, and cutting their Grass, so they may for carrying away the Hay coming of it : *Aliter* if it had been for 20 Loads of Hay, and not said *inde provenien*. *Cro. El.* 196. *Cookson and Castle's Case* : The like Case is that of *Wilks and Peerjon*. 1 *Leon.* 107, N^o 140. Trespass by *Wilks* and his Wife, and *Tho. P. Quare clausum fregit, herbam suam messuit & fenum suum asportavit ad damnum ipsius W. & Ux. & Tho. P.* Exception was taken that it was not the Hay of the Wife, nor was she damnified by it, but her Husband. By *Wray* : It is good enough ; for though it be not good for the Hay, yet it is for the breaking the Close, & *herbam messuit* makes it good.

Ad damnum
ipsorum.

Trespass by Baron and Feme for breaking the Close of the Wife *ad damnum ipsorum* ; and after Verdict, *per Curiam*, This Declaration is not good, nor aided by the Stat. *Cro. Jac.* 473. *Marshal & Ux* vers. *Dorley*.

Trespass, *Quare clausum fregit & blada messuit*, brought by Baron and Feme, and Judgment given for them, but it was reversed, because Feme Covert may not have *Blees* in Common with her Husband ; and if it were that the *Blees* were common to them before the Coverture, that ought to be shewed ; for the Count ought to have a general Intendment and not special.

P. 31. El. B. R. Note the Difference between this Case and the Case of *Cookson supra*, *Quare herbam messuit, & 20 caretatas feni inde provenien*, &c. because the Hay depends on

on the breaking of the Close, and all was but one Trespass. *Dyer 305. b. in marg. yet vide Roll. Rep. 264.*

Trover. Vide supra, Principio hujus Capitis.

Baron and Feme brought Escape; the Husband only arrests the Prisoner with a *Latitat*, and takes the *Latitat* in his own Name sole; and now in the Declaration in Escape, he declares that he took out the *Latitat*, *ea intentione*, to charge the Prisoner upon a Bond made to the Wife when she was sole; and *per Cur'*, It is good. 2 *Roll. Rep. 312.*

If Trespass be made to Baron, and Battery to the Wife, the Action shall be brought *ad respond'* A. *quare clausum fregit & subbofsum, &c. ac in E. Uxor' ipsius A. ibid. insultum fecit: Et ad respond'* A. & E. *de placito quare clausum ipsorum A. & E. &c. fregit ac in ipsam E. insultum fecit, &c. Et non ad respond'* A. *quare clausum ipsius A. apud, &c. fregit. Et in ipsam E. apud R. insultum fecit, come fuit in Case de Midwych. Ex Manuscript. Mri. Brownloe.*

Action on the Case.

Sur Assumpsit.

The Plaintiff, in Consideration the Father of the Defendant, having Interest in certain Wood and Timber, would not cut them, but would permit them to come to the Defendant, his Heir apparent to the Land, assumed to pay 100 £. to his Daughter, being the Wife of the Plaintiff: *Verdict pro Quer'*. It is intended after *Verdict*, that the Father had good Power to cut them down. *Per Curiam*: The Action is well maintainable by the Plaintiff, for the

Benefit appertains to the Daughter, and he may refuse it. Sir Tho. Jones 102, 103. *Dutton and Ux against Poole*. 1 Vent. 318. *Mesme Case*.

T. T. was indebted to *T. J.* in 20 l. *T. J.* made *E.* his Wife Executrix; whereas *T. T.* was indebted to *E.* for Wares bought of her, and *T. T.* died, and made his Wife Executrix, (now the Wife of the Defendant) and *E.* took the Plaintiff to Husband, and the Plaintiff required Payment, and the Defendant in Consideration he would forbear her, promised, &c. *Quære*, If the Wife ought to have been joined in the Action; because the Ground of the Action to the Plaintiff principally ariseth from the Plaintiff's Wife, being Executrix to her Husband, and for a Debt due *dum sola*? But by two Judges against one, It is good without her, for that is but Part of the Consideration, and the Forbearance is his Act only; and therefore the Action lies for him. *Cro. Jac.* 110. *Mynes and Lee*.

Ad damnum
ipforum.

Whereas the Defendant received of the Plaintiff's Money by the Hands of the Plaintiff's Wife, &c. The Defendant in Consideration thereof, promised unto them to pay it at such a Day, and alledgeth the Breach for Non-payment. The Defendant pleads *Non assumpsit*, and found for him: It was moved in Arrest, that this Promise is void, being for Monies of the Baron and Feme's; and *ad damnum ipforum* cannot be; for a Feme Covert cannot have Goods with her Husband; and though it was objected, that it may be for Money due to the Wife *dum sola*, or for Rent during the Coverture, it was held it shall not be so intended without it had been shewed; and adjudged for the Defendant. *Cro. Jac.* p. 644. *Abbot & sa Feme vers. Blofeild*.
Indebitatus

Indebitatus by the Baron alone for Money due to the Wife of the Plaintiff, as Executrix; Judgment *per Curiam* was stayed, though the Husband hath Power to discharge such a Debr. So had it been *sur computasset* with the Wife, or any other Promise raised by the Law: But by *Wyndham*, Were the Action on a Promise made to the Husband in Consideration of Forbearance, he alone might bring the Action. 1 Keb. 136. *Tyrrel and Bennet*. Sid. 299.

Case, &c. The Plaintiff declared, That whereas the Defendant was indebted to him the Plaintiff and *Elizabeth* his Wife, Executrix of one *Toller*, in 5 l. for Arrears of Rent due to her Testator in his Life-Time: He the Defendant, in Consideration the Plaintiff would give him Time for Payment of the Money until *Michaelmas* next following, (which was about Three Months,) he would pay the Money; and the Plaintiff averred that he had given the Defendant that Time, and that his (the Plaintiff's) Wife was still living, but that the Defendant had not paid the Money.

Carthew
462, &c.
Yard v. *Ellard*, S. C.
1. Salk. 117.

Upon *non assumpsit* pleaded the Plaintiff had a Verdict, and now it was moved in Arrest of Judgment, that this Promise was void in Law. For if the Husband should recover upon it, such Recovery will be in his own Right, and the Damages will not be Assets of the Testator.

Besides, If this Promise hath any Effect in Law, the Wife who is Executrix, and upon whose Account the Husband is entitled to demand the Money, ought to have been joined in the Action.

To which it was answered, That this was a good Promise in Law grounded upon a good Consideration; for the Husband had the absolute

solute Power of demanding the Money, and prosecuting the Defendant to recover it ; he had also full Power to release the Debt without the Consent of his Wife, and the Consideration of the Promise was a Benefit to the Defendant, and a Loss to the Plaintiff.

Moreover the *Damages* recovered in this Action would in Law be accounted Assets of the Testator, *because upon the Face of the Record it would appear that the Action was founded upon a Debt due to him*, or at least such a Recovery by the Husband alone would amount to a *Devastavit* in Law *pro tanto*, so as to charge both Husband and Wife in their own Right, and by that Means the Testator's Estate will not be diminished.

And as to the Objection, that the Wife ought to be joined in this Action, it was impossible so to do, because she was no Party to the Contract or Agreement between her Husband and the Defendant, and they would have been nonsuited if they had been joined in this Action, because a Promise made to the Husband alone, is not the same with a Promise made to the Husband and Wife, and the Case in the Margin was cited as an Authority in Point of the Action.

Lee vers.
Mimms
Yelv. 84.

And the whole Court was of this Opinion, only *per Holt C. J.* the Recovery by the Husband would amount to a *Devastavit pro tanto* : *Sed per Rookeby Justice*, it would be direct Assets at Law.

If *Assumpsit* be made to a Feme Covert, they ought to join. *Sid. 25. Shipston and Booter, as Assumpsit.* A Feme Covert, which was a Surgeon, in Consideration of a Cure by her made, that the Action ought to be brought by the

the Baron. Cro. Jac. 205. *Brasford and Buckingham.* 2 Sid. 128. in both their Names.

Buckley & Ux. vers. Collier, Mich. 4 W. & M. Rot. 20. Indebitatus Assumpsit by Husband and Wife, in which they declare that the Defendant *indebitatus fuit* to them (the Plaintiffs) in such a Sum of Money for Periwig Maker's Work done by the Wife, at the Request of the Defendant, and concludes *ad damnum ipsorum, &c.*

The Defendant pleaded a frivolous Plea, to which the Plaintiff demurred; and the Question was whether this Action was well brought by *Husband and Wife*, or whether it ought to be by the Husband alone?

It was insisted that they ought to join in this Case, because the Cause of Action did arise from the particular Skill of the Wife in making Periwigs, and for which she might have an Action after the Death of her Husband, and for that Purpose the Cases in the Margin were cited.

2 Cro. 77.
Cro. El. 61.
96. Cro.
Car. 439.
2 Sid. 128.

To which it was answered, and so resolved, That this Case differs from those cited, because those are upon Special Promises made to the *Wife only*, and therefore in such Cases the Wife must be a Party to the Action; but here the Action is upon a general *Indebitatus Assumpsit* on a Promise implied by Law; but that the Law will not in this Case imply any Promise to the Wife, for she is a Servant to the Husband, who is at all the Charge in providing Materials, as Hair, &c. to carry on the Trade of Periwig-making, therefore he ought to have the Recompense; so that the Law implies the Promise was made to him only; *quod nota.*

Judgment

Judgment *quod querens nil capiat*. *Cartbrey* 251. *Buckley & Uxor* vers. *Collier*. S. C. 4. *Mad.* 156.

Promise, to
Feme.

If *A.* speak with *B.* to sell Land to *B.* and after *B.* promiseth to *K.* the Wife of *A.* in Consideration she will not hinder the said *A.* her Husband, to levy a Fine to him of the said Land, to pay to her 10*l.* or to give her a Riding Suit; if the Wife doth not hinder the Husband, but he levies the Fine accordingly, the Husband and Wife may have Action on the Promise, for the Promise is laid in the Declaration to be made to the Wife; for they may join at the Election of the Baron. 1 *Roll. Abr.* 32. *Faucet's Case*.

Election.

Promise to the
Feme.

If *A.* be in Execution at the Suit of *B.* and *C.* a Stranger, comes to *B.*'s House in the Absence of *B.* and assumes to the Wife, that if *B.* her Husband will discharge *A.* out of Execution, that he will pay the Debt at such a Day if *A.* doth not pay it before; and after *B.* comes to his House, and his Wife shews to him the said *Assumpsit* and agrees to it, and dischargeth *B.* out of Execution, *B.* shall have Action on this *Assumpsit*. 1 *Roll. Abr.* 31, 32. 27 *H. 8.* 24. *Tatam's Case*. *Godbolt* 361.

Promise made to the Baron and Feme during the Coverture, Action may be brought in the Name of the Baron only, or else he may join her at Election, as I conceive.

C. and his Wife brought Action on the Case against *T.* and declared that the Defendant, in Consideration the Plaintiff would marry *A.* that is now the Plaintiff's Wife, did assume to make good a Legacy given by her Father's Will, and 40*l.* more, at such a Time; and that thereupon he did marry her. On *non Assumpsit*, and Verdict *pro Quer'*, it was moved in Arrest of Judgment

Judgment that the Wife was joined in the Action. And *per Curiam*: Here the Promise was made to the Husband only, and he is only to have the Benefit of the Promise; and though the Money is to be paid to both, yet it would be inconvenient to intitle the Wife to it, for then the Wife might have released it before Marriage; *Quer' nil capiat per billam.* Style 297.

Tho' the Money be promised be paid to the Wife, yet Baron sole shall have the Action.

313. *Cotterel* and his Wife against *Theobalds*.

Whereas the Wife of the Plaintiff, in Consideration the Defendant should marry her Daughter, had given to him 10*l.* he promised to the Wife, that if he did not marry her Daughter, he would repay the 10*l.* and avers he did not marry her; and Verdict *pro Quer'*. The Action was brought by Baron and Feme. And *per Curiam*: It is well brought; for the Agreement of the Husband maketh the Promise good *ab initio* to the Husband, and it being made to Wife, they may join in the Action. *Cro. El. 61. Prat and Ux. vers. Taylor.* 1 *Keb.* 252.

If a Man promise to give 100*l.* to the Wife of *J. S.* they ought (*per Cur'*) to join in Action for Recovery of it. 1 *Bulst.* 21.

Action on the Case *pur Tort.*

A Feme sole had Right to Common for her Life, and she marries; the Husband was interrupted in taking the Common, and he brought Action in his own Name, and good; being only to recover Damages. 2 *Bulst.* 14. *Butler's Case.*

So in *Quare Impedit.*

So in *Ejectione Firme.*

John C. and *Joan* his Wife brought Action on the Case against *G. M.* and declared, Whereas the said *John* and *Joan* were seised of a Messuage and Lands *in jure Jonnnæ*, and that the said *John* and *Joan*, and all those whose

Estates

*Prescription
for Common in
jure Uxoris.*

Estates they have, &c. *in jure Joannæ*, Time out of Memory have had Common in such a Waste, which is the Soil of the Defendant *pro omnibus averiis levant & couchant*, &c. and the Defendant had inclosed 20 Acres of the said Waste. *Per Curiam*: The Prescription is good, though it had been better if he had said all those whose Estate the Wife hath; but this is Tantamount, for it goes meely to the State of the Wife; and the better Opinion was, that the Wife could not join in this Action; as if he were seised in the Right of the Wife, and he brings Trespass for Trespass done upon the Land, the Wife may not join, for she shall not have Damages if she survive; but if Battery be to the Wife, they both shall join, for the Wife shall have the Action if she survive, and so was the Cook of *Grays-Inn's Case*; but here the Husband only loseth the Benefit of the Common, and the Wife shall not take this with her Cattle, for she shall have none during the Coverture. *Lit. Rep. 285. Castrell and Sir Geo. Marr.*

But in *Baker's Case*, *Cro. Car. 418*. Action was brought by Baron and Feme, for that the Wife before Marriage was possess'd of a Lease for Years of a Close, and had a Way from her Close over-----And the Defendant to hinder her of her Way, erected a Building *ex transverso via prad'*, and that afterwards she married the Plaintiff *Baker*, and they after their Intermarriage could not use the said Way, to their Damage, &c. It was excepted, that the Wife ought not to join with the Husband for the stopping during the Coverture; *sed non allocatur*; for the Wrong was done to the Wife, and the Husband had it but in the Right of the Wife. *Baker vers. Brereman.*

Baron and Feme join in Action on the Case for a vexatious Suit in the Court of the Ordinary, being presented falsely and maliciously, that they made Hay on a Sunday. It was a Doubt if the Action lay by Baron and Feme, because their Vexation is several; at least, the Feme cannot have Damages for the Vexation to her Husband, & *adjournatur*. Cro. Jac. 355. *Ward and Ux. versus Pease.*

Feme Lessee for Years of a Mill, takes Husband, the Baron and Feme cannot join in an Action on the Case for the Suit, because it is only to recover Damages, and not the Term. Hob. 189.

One covenants to stand seised to the Use of himself and his Wife for their Lives, and after to his Son, except the Timber-Trees, saving that his Wife shall have the Shrowds and Loppings. Husband dies; she marries the Plaintiff: The Son cut down fifty Oaks, whereby the Plaintiff lost the Benefit of the Shrowds. Verdict *pro Quer.* This Action was brought by Baron and Feme, and good, though the Husband might only have released the Damages; and if she survive, she shall have the Action, and the Damages also. Cro. Car. 437. *Trigmet against Reeve.*

Rescous.

The Baron distrains for Rent due to the Feme *dum sola fuit*; *Rescous* is made, Baron sole shall have a Writ of *Rescous*, or at his Pleasure he may join the Wife with him; yet for a Debt due to the Wife *dum sola*, they ought to join. Moor 442. *Fenner and Plasket.*

Rent-Charge granted to the Wife, and to E. C. her first Husband. E. C. died; she married the Plaintiff, and for Rent due *durante vi-*
duitate

duitate of his Wife, he distrained; and upon *Rescous* he may bring *Rescous* in his own Name, or join the Wife with him at Election. *Cro. El.* 459. *Fenner's Case. Vide supra.*

Detinue.

Baron and Feme shall join in Detinue for Charters concerning the Inheritance of the Wife, (for the Wife shall have them again when recover'd) 38 H. 6. 4.

For Bailment *dum soln*, Baron and Feme cannot join in Detinue. 1 Keb. 640.

Forcible Entry.

In Action of Forcible Entry on the Wife's Land, she was joined with her Husband. 2 Vent. 195.

Baron and Feme brought a Writ of Conspiracy, it will not lie. *March Rep.* 47.

Error. Vide Fine.

Where the Baron and Feme shall join or not, and how and in what Cases.

If Action be brought against A. as a Feme Sole, where she is a Feme Covert, and she pleads to Issue as a Feme Sole, and after a Judgment is given against her, and she is taken in Execution, she and her Husband may bring a Writ of Error for this, otherwise the Husband would be prejudiced in his Consortship of his Wife, and of her Care about his Family; and he hath no other Means to aid himself. But in the Case of a Fine, the Baron may enter, and avoid it. *M. 15 Car. 1. B. R. Edwards and*

Simp-

Simpson, on Judgment in the *Marshalsea*, Trin: 1651. *Hayward's Case*. So in the same Case, if the Action be brought against *A.* and others, they all with the Husband may join on the Writ of Error, 1 *Roll. Abr.* 748. and the Judgment shall be reversed for all, because it is intire. They may assign for Error the Coverture of the Wife, 1 *Roll. Abr.* 776. and the Difference is, in *Style's Rep.* 280. A Stranger to a Record may bring a Writ of Error to reverse it, as in the principal Case the Baron was, but that is only where he may have another Remedy to avoid the Prejudice; which in this Case he hath not.

Coverture of the Wife assigned for Error.

If the Husband, seised in the Right of his *Ejectment.* Wife, make an Ejectment Lease, and the Lessee bring Action upon it, and had a Verdict and Judgment, it is no Error to alledge the Death of the Woman before Judgment, by which the Interest of the Husband, and the Lease made by him determines, because the Wife nor Husband are Parties to the Action; and this depends upon the Title to the Land, for the Plaintiff may say that the Baron was seised in his own Right. *Hob. Wilks and Jordan.* 1 *Roll. Abr.* 768.

If the Wife be receiv'd by Default of the Husband, and lose the Land by Judgment, the Baron and Feme shall have a Writ of Error. 4 *Ed. 5.* 21. *b.*

If Baron and Feme levy a Fine, they may, by Error, reverse the Fine, for Nonage of the Wife during the Life of the Husband. 2 *Co. Beckworth's Case*, 77. *b.* *Worsley's Case*.

W. and his Wife brought Error to reverse Judgment and Outlawry against them in Debt; and because it was to reverse Outlawry, they could not assign Error but in Person: And because the Husband could not bring in his Wife, Husband cannot assign Error without his Wife to reverse Outlawry against them.

it was held that he could not assign Error; for he cannot assign it without his Wife, and so is the Course of the Court. *Cro. El. 611. Wade and his Wife against Smith.*

Regula.

Where Baron and Feme sue in an Action, they shall sue by Attorney, for the Husband makes Attorney for them both. *2 Saund. 213.* This is to be understood where the Wife is of full Age.

Actions brought by a Feme Covert without her Husband. Of a Feme Sole Merchant.

In two Cases a Feme Covert hath been, in our ancient Books, held to be able to sue without naming her Husband.

1. In Case of Exilement.
2. In Case of Abjuration.

As to Exilement, it was the Case of Sir Robert Belknap's Wife: Her Husband being banish'd beyond Sea in the Time of Hen. IV. she sued a Writ of Dower in her own Name, without her Husband, he being alive, and recover'd it: Which occasion'd one to make this Reflection.

*Ecce modo mirum quod fœmina fert breve Regis,
Non nominando virum conjunctum robore Legis.*

And yet it was no such Wonder; for King Edw. III. long before brought a *Quare Impedit* against the Lady Maltraverse, and she pleaded she was Covert of Baron; wheretoe it was reply'd for the King, That her Husband the Lord Maltraverse was exiled for a certain Cause; and she was ruled to answer.

So

So in the Case of Abjuration: It was *Weyland's* Case in the Time of *Ed. 1.* It was held, that after the Abjuration of her Husband she should have her Jointure; and an Action was brought by her alone for a personal Wrong done to the Estate convey'd to her, 1 *Inst.* 132. *b.* 133. *a.* 3 *Bulst.* 188. because this Exile and Abjuration is a Civil Death: But in Relegation or Exilement for a Time, *aliter.*

In some other Cases a Feme Covert may sue without her Husband.

Feme Covert, by the Custom of *London*, shall sue without her Husband as sole Merchant; by *Wray*; but the Action must be laid within the City; in *Chamberlain* and *Sharp's* Case, 1 *Leon.* 131.

But every Feme which trades in *London* is not a Feme sole Merchant.

On *Habeas Corpus* to remove the Body *cum causa* of the Wife of *B.* it was returned, That the Action was brought against her and her Husband, in Lands as a Feme sole Merchant, for Wares bought by the Feme, wherein the Husband was only named for Conformity; and by the Custom the Execution shall be only against her. *Cro. Jac. Langham versus the Wife of Bluet.*

The Case in *Littleton's Reports* was; *Bluet* was a Vintner, and press'd for a Soldier beyond Sea, and goes over Sea; the Wife takes an House, and buys Wine of *Langham*, who trusts her, supposing her to be a Feme Sole Merchant: After the Husband returns, and the Wife denies to pay for the Wine; and the Doubt was, If the Wife were a Feme Sole Merchant by the Custom? And the Words of the Custom were read, That where a Woman exerciseth a Trade, wherein her Husband doth

not intermeddle, she shall have all Advantages, and shall be sued as a Feme Sole Merchant by the Custom: And by *Richardson* and *Yelverton*, She is not a Feme Sole Merchant within the Custom, for her Husband exercised the same Trade; and by *Yelverton*, Feme Sole Merchant ought to be the Widow of a Tradesman, who takes a second Husband, and she after exerciseth the Trade of her first Husband. But *Croke*, *Hutton*, and *Harvey contra*. If the Husband meddle with the Trade of the Wife, then she is not a Feme Sole Merchant; but if the Husband be beyond Sea, or becomes Bankrupt, or leaves his Trade, and the Wife exercise the same Trade, or they both exercise the same Trade distinctly by themselves, and not meddle the one with the other, the Wife is Sole Merchant. *Lit. Rep.* 31. *Mesme Case*; but *vide in* 1 *Croke* 67. the same Case.

The Custom of a Feme Sole Merchant was alledged, and a Procedendo was awarded.

Feme was indicted as a Feme Sole Merchant, for selling Ale, and her Husband not joined; where she used the same Trade, she doth it as a Servant, and he alone shall be indicted: Nor will any Action lie here (in *B. R.*) against her alone, and a *Procedendo* was awarded. 2 *Keb.* 583. *Moreton* and *Packman*: So a *Procedendo* was awarded in *Royston* and *Ivory's Case*, on Suit of a Feme Covert as Sole Merchant, the Custom being alledged in the Declaration. 3 *Keb.* 302.

Wife may sue as a Feme Sole in the Spiritual Court.

If Baron and Feme are divorced *causa Adulterii*, and after the Wife sues sole without the Husband for a Defamation; although the Divorce does not dissolve the Marriage, yet because the Wife may sue as a Feme Sole, in such Case by the Course of the Spiritual Court, no Prohibition shall be granted, though it be against the

the Usage of our Law. 2 Roll. Abr. 298. and fol. 300, 301.

There is a Case in 1 Bulst. 140. which I think is misreported: If a Feme Covert, in the Absence of her Husband, he being beyond Sea, doth bring Trespas of Assault and Battery made upon her, in her own Name, and in the Name of her absent Husband, this is well brought; and she may bring such Action in her own Name without her Husband, *quod cave*; but she cannot be sued by another without her Husband, tho' he be then beyond Sea, such a Suit cannot be maintained before the Return of her Husband.

If I make a Lease to Baron and Feme, and they covenant to do no Waste, or to repair Houses, and the Husband dies, and the Wife survives, and holdeth it; if the Wife commit Waste, or do not repair the House, no Action lies against her; but in such Case the Wife is tied to pay Rent, or to perform a Condition made on the Part of the Lessor, but not to observe or perform the Covenant of the Lessee. 1 Brownl. 31.

Baron and Feme covenant not to commit Waste, Baron dies, no Action lies against the Wife.

If a Suit be in the Spiritual Court against a Woman for exercising the Trade of a Midwife, without Licence of the Ordinary, against the Canons, a Prohibition lies; for this is not any Spiritual Function of which they have Cognisance. 2 Roll. Abr. 286. *Benskin and Crips.*

Suit against a Woman for exercising the Trade of a Midwife.

A Wife that hath concerned herself in her Husband's Trade, may use it when a Widow, if she has liv'd with her Husband seven Years; for she shall be construed to be within the Words of the Statute, and to have serv'd an Apprenticeship, though never put Apprentice. *Shower's Rep. 242.*

*The Husband
promises Pay-
ment of a Debt
of his Wife's,
who was a
Feme sole
Trader; void.*

*He need not
bail his Wife,
if she be a
Feme sole
Trader.*

A Feme sole Trader died, being indebted 57 l. The Husband promis'd to pay it after her Death; and it was held, That there was no sufficient Consideration to found the Promise upon, and therefore it was void; for where the Feme exercises a Trade, in which the Husband does not intermeddle, she may, by the Custom of London, have all Advantages, and be sued as a Feme Sole. In her Life-time he was only nameable for Conformity, and he need not have put in Bail for her, nor were his Goods chargeable upon Account of her Trade: But where a Feme sole Trader acquires an Estate, and dies, and the Husband possesses himself of it, possibly he may be answerable for her Debts, *Shower's Rep. 183.*

If a Feme Covert brings an Action against a Man as a Feme Sole, and the Defendant pleads in Bar, he cannot afterwards assign this for Error. *Shower's Rep. 183.*

*Out of the Ci-
ty, where the
Wife deals se-
parately, her
Contracts
charge the Hus-
band, if he co-
habit with her.*

If, out of the City, the Husband and Wife cohabit, and the Wife deals separately, her Contracts shall charge the Husband; for Cohabitation is sufficient Evidence that he had Notice. *7 Mod. 162.*

C H A P. XXVII.

Special Actions brought by a Woman. Cui in Vita. Appeal. The Nature of an Appeal. The Process, Pleadings, and Trial in an Appeal. Quare Impedit. Actions on the Case for scandalous Words by Baron and Feme against Baron and Feme, with Declarations and Pleadings therein, and where Baron and Feme must join or be joined in the Action.

Cui in Vita,

IS a proper Action or Remedy to be brought by the Wife upon the Husband's aliening her Lands by Feoffment, &c. the Wife at Common Law might not enter, but is put to her Action, which is call'd *Cui in vita*; and upon this Discontinuance, her Heir might have a *Sur cui in vita*; but if the Wife were Tenant in Tail, and her Husband alien in Fee, and dies, and the Wife dies, the Issue in Tail cannot have a *Sur cui in vita*, but he must have his *Formedon* in Discender, by Stat. *W. 2. c. 1.* but this is remedied by the Stat. *32 H. 8.* and the Wife may enter.

If the Baron and Feme lose by Default, and the Baron die, the Wife shall not have a *Quod ei deforc*; for a *Cui in vita*, in that Case, is given to her by the Stat. *W. 2. cap. 3.*

So on Recovery in Action of Waste against the Baron and Feme by Default, the Wife shall have a *Cui in vita*. 1 Inst. 355.

In a *Sur cui in vita* of a Messuage, the Parties being at Issue, it was found by Verdict, that a Discontinuance being of a Messuage, the Discontinuee pulls it down, and erected a new

House, Part on the Land discontinued, and Part on his own Land adjoining, and the Writ was brought for the intire Messuage, and well; and there needed no Foreprise. And the Demandant recover'd, but Judgment was enter'd specially, that the Demandant should recover *Messung' præd'*, viz. so much in Length, and so much in Breadth, as the Verdict found. *Cro. Eliz.* 234. *Hayes and Allen.*

But by the Stat. 32 H. 8. cap. 28. in such Case of Discontinuance, the Wife and her Heirs, after the Death of the Husband, may enter into the said Lands and Tenements so aliened, and are not driven to this Action. 1 *Inst.* 326. a. 2 *Inst.* 456.

Appeal.

Famina de morte viri sui inter brachia interfecti & non aliter poterit appellare, saith *Fleta*. Where by *inter brachia* is understood the Wife, which the Dead had lawfully in Possession at his Death; for she must be his Wife *de facto* and *de jure*, for in Appeal *n'unq; accouple en Loyal Matrimony*, is a good Plea. 2 *Inst.* 69.

None but a Wife *de jure* shall have an Appeal.
A Wife *de facto* shall have Dower.

The Wife in Possession, without lawful Matrimony, shall not have Appeal; she must be Wife *de jure* as well as *de facto*, without Elopement or Divorce, 2 *Inst.* 317. and the Plea *n'unq; accouple* shall be taken strictly: But a Wife *de facto* shall have Dower, though not an Appeal; and in other Cases, she shall have Appeal, where she cannot have a Writ of Dower: As if she elope, she is barred of her Dower, but not of her Appeal; because the Stat. W. 2. cap. 34. bars her of her Dower, but not of her Appeal. If the Husband be attainted

ed of Treason, the Wife shall not be endow'd ; yet if any Kill him, she shall have Appeal. 1 *Inst.* 33. b.

A Woman, at this Day, may have an Appeal of Robbery, Rape and Mayhem, for she is not restrained thereof. 2 *Inst.* 68, 69.

Before the Stat. *Mag. Chart. cap.* 34. a Woman, as well as a Man, might have had an Appeal of the Death of any of her Ancestors, but now she is disabled to bring Appeal of the Death of any but her Husband ; but the Son of a Woman shall, at this Day, have Appeal, if he be Heir at the Death of the Ancestor.

No Appeal lies for a Woman as Heir.

The Right of Appeal of the Death of her Husband is annex'd to her Widowhood, therefore if the Wife of the dead Person marry again, her Appeal is gone, though the second Husband die within the Year. And if she brings her Appeal in her Widowhood, and takes Husband, the Appeal abates for ever. So if in Appeal she hath Judgment of Death against the Defendant, if after she take Husband, she can never have Execution of Death against him. *Appeal annexed to the Widowhood,*

Albeit the Husband be attainted of High Treason or Felony, yet if he be slain, his Wife shall have an Appeal ; for notwithstanding the Attainder, he was *vir suus* ; but the Heir cannot have an Appeal, for the Blood is corrupted between them. 2 *Inst.* 68, 69.

After the Year and Day, the Appeal of Death cannot be commenced ; the Year and Day is to be accounted from the Death. *It must be within the Year and Day.*

The Plaintiff pursues an Appeal for the Murder of her Husband ; upon the Return of the Writ it was moved, that the Plaintiff might prosecute by Attorney, for which a Warrant was *Process.*

was

was produced under the Hand and Seal of the Plaintiff; which being avow'd by her in Person, she was admitted so, and the Warrant filed, and after the Appeal was arraigned in the French Language; and after the Prisoner being at the Bar, was arraigned by *Lindsey* Secondary, and pleads *Not guilty*: Upon this he was deliver'd by Mainprise of a Lord and two Esquires, to appear *de die in diem*. Sir *Tho. Jones* 210. *Warren and Verden*.

By the Stat. of *Glouc'*, cap. 9. the Count of the Appellant must comprehend seven Things: 1. The Fact. 2. The Year. 3. The Day. 4. The Hour. 5. The Year of the King. 6. The Town where the Fact was done. 7. With what Weapon, (if any Weapon were) of which you may fully read in 2 *Inst.* 317, 318, 319.

Convict of
Man slaughter
shall not be
tried in an Ap-
peal of Mur-
der.

It was resolved in the Case of *Armstrong* and *Lisle*, That where one is indicted of Murder, and thereupon convicted of Manslaughter; if an Appeal of Murder be brought against him, he may insist upon being allow'd his Clergy before he answers the Appeal: And where a Person is convicted of Manslaughter, and hath his Clergy, it will be a good Bar to an Appeal of Murder. *Kel.* 107, 108.

Pleadings or Bars in Appeal.

In Appeal of Murder by a Feme; the Defendant pleads *nient accouple en Loyal Matrimony, & si, &c.* Not guilty to the Felony. The Plaintiff replies, She was *accouple en Loyal Matrimony*, nor does not answer nor plead that he was guilty of the Felony. *Quare*, If it be a Discontinuance? *Et per Curiam*.

When

When a Plea is pleaded which is triable at Reg. Common Law, and concludes over to the Felony, there the Plaintiff ought to reply, and conclude over to the Felony; but when he pleads a Plea triable otherwise than by the Common Law, it is otherwise. *Cro. El. p. 223. Withington and Delahar.*

B. was indicted for the Murder of *W.* and being arraigned upon it, pleads that *A.* the Wife of *W.* brought Appeal against him for this Murder, and that he was arraigned upon it, and pleaded Not guilty, and found by Jury that he was not guilty of Murder, but Manslaughter; and that thereupon he prayed his Clergy, and had it, and demands Judgment if he shall be put again to answer this Felony; and it was adjudged a good Plea. *Quære*; For the finding him guilty of Manslaughter in the Appeal, is more than needs, and then the Allowance of Clergy is to no Purpose. *Cro. El. 256. Barley's Case.*

In Appeal brought by *E. B.* of the Death of her Husband against *R. R.* who came in upon the Exigent. The Defendant appears, and demands Oyer of the Writ, and of all the mean Processes which were entred upon Record. Then the Plaintiff having declared in her Appeal, the Defendant pleads that at the general Gaol-delivery at York before Commissioners assigned, he was indicted of the Felony comprised in the Appeal, and arraigned and found guilty of Manslaughter, and had his Clergy, *pro ut patet per record*; And further saith, that *nullum judicium* was given upon the Premises, and took all the material Averments, &c. *Et quoad murdrum & feloniam præd* he said he is not guilty; and Plaintiff demurs; it was agreed *per Curiam*. 1. No Appearance by the Defendant in

Pleading of Conviction with Clergy allowed.

in Appeal shall aid any Discontinuance of Suit, but Error in the mean Process is salved by an Appearance after, as in 9 H. 6. 2. in Appeal the Exigent *cepi corpus*, where it should be *exigi fec'*. The Defendant appeared, and was acquitted, and prayed his Damage; he shall have his Damage, because the Foundation of the Suit, (*viz.*) the Writ of Appeal, and all the Process which issued at the Suit of the Party, is good and Right. 2. The Plea was good; 1. Because *ex necessitate juris*: The Defendant need not plead *omnino* to the Country, where he had pleaded a good special Plea before; and here the Pleading of the Conviction with the Clergy allowed, is a good Plea in Bar of this Appeal; and so was *Wrott* and *Wigg's* Case, 33 El. and 4 Co. 45, 46. *Burgh* and *Holcroft*; and then the Pleading further to the Felony is negative: And the Word (*Murdrum*) can be taken for no other than Manslaughter, and he does not say *malitia premeditata*. *Yelv. p. 204. 9 Jac. Bradley and Banks.*

Release of Action criminal or mortal, or Pleas of the Crown, is a good Bar in Appeal. 1 *Inst. 289. b.*

Trial.

Appeal for the Death of her Husband. Upon several Issues pleaded, the Plaintiff was nonsuited upon a Trial against the one. *Per Curiam*: It is a Nonsuit against all; and therefore as to the Suit of the Party, it was ruled that he should be discharged; but that the others who were not tried, should be arraigned at the Queen's Suit. *Cro. El. 460. Curtis vers. Savill, and three others.*

It is against a Rule in Law that a Trial for Murder by Appeal or otherwise, should be out of the County where it was committed; Appeals were never allowed in Counties adjoining for Murder done in *Wales*. *Cro. Car.* 247. *Fentley and Price.*

In Appeal by a Feme Covert of the Death of her Husband, if the Defendant saith that the Husband is alive in another County, this shall be tried by Proofs. 43 *Aff.* 26. So if he saith, he is alive generally, without saying in another County.

If the Appellee be acquitted, he shall recover Damages, by Stat. *W. 2. c. 12.* yet every Appellee, upon his being acquitted, shall not recover Damages. As if a Feme Covert be appealed alone without her Husband, and acquitted, because of her Disability; but if Appeal be brought against Husband and Wife, and they be acquitted, Damages shall be recovered by the Husband alone, and shall be given to the Husband and Wife, for the Damage of the Wife. 2 *Inst.* 385, 386.

If a Feme Covert be acquitted upon Appeal, she shall have Damages against the Abettor. 2 *Hob.* 98.

Quare Impedit.

If the Husband be disturbed to present to an Advowson which he had in the Right of the Wife, and dies, the Wife shall have a *Quare Impedit* of this Disturbance. 3 *H. 5. Q. Imped* 21.

Husband seised of an Advowson in the Right of his Wife, presents, and after hath Issue, and the Wife dies, and the Church is void; the Husband shall not have *Assise of Darrein Presentment*, because

because he is in of another Estate than he presented to before; for before he was seised in the Right of his Wife, and now he hath an Estate for Life. *Keb. 118. b.* But if the Husband after Issue had presented, and after the Wife dies, and the Church is void, the Husband shall have this Writ of *Darrein Presentment*, because he had Inception to an Estate for Life by the Courtesy by the first Presentment, which is now compleat.

If two Copartners be, and they cannot agree to present, the eldest shall present; and if her Sister disturbs her, she shall have a *Quare Impedit* against her. So Tenant per Courtesy of the eldest shall present.

A. and B. his Wife present to a Church to which they have no Right, this gains nothing to the Wife; for the Wife is at the Will of the Husband, and Presentation is but Commendation, or the Act of the Husband, and it is not like to an Entry into Lands by them; *aliter* it is when the Wife hath Right. *March, p. 90.*

Actions on the Case for scandalous Words spoken by Baron and Feme against Baron and Feme.

There are many Cases of this Nature in our Books, which because they properly belong to another Title, I shall not take Notice of, but come to such Cases which more immediately concern this Subject.

Action was brought in London for calling a Woman Whore; the Defendant removed the Cause into B. R. and the Court granted a *Procedendo* to try it in London; for by Rolle: We cannot determine the Custom. *Style Rep. 244.*

The Defendant's Wife spake of the Plaintiff's Wife these Words, *Thou art a Thievish Queen*
 2 and

and hast stolen my Faggots, innuendo, five Faggots of the Defendant's and his Wife's: It was moved that the Words are not actionable; for a Feme Covert hath not any Goods that can be stolen. But *per Curiam*: The Action lies, she chargeth her with Felony, and it is no matter whose Goods they are. Cro. Jac. 600. Stamp and Ux. vers. White and Ux.

If a Feme Covert saith to another, *Thou hast stolen my Goods*; the other asked, *What Goods?* the Wife answered, *My Plow and Stuff*. And in the Declaration the Plaintiff averred innuendo, Plow and Stuff of the Husband: No Action lies; for a Feme Covert cannot have Goods.

1 Roll. Abr. 74.

Thou hast sought the Blood of my Husband, and wast his Death; for hadst thou been an honest Woman he had been alive still; and avers in Facto that her Husband was killed: The Words are actionable. Cro. El. 293. Gastrell and Townsend.

Toose his Wife, innuendo the Plaintiff, hath killed thy Husband, innuendo J. D. her Husband lately dead: The Words were adjudged actionable. Cro. Jac. 306. Toose's Case.

If a Man saith, *A Woman told me Meg his Wife had poisoned Griffin her first Husband in a Mess of Milk*: Meg and his Wife may have Action of Slander for this, for otherwise a Man may raise a Slander of his own Head, and not be punished. 1 Roll. Abr. 64. Meg and Griffin.

One said of a Woman, *Thou didst poison thy Husband, and I will justifie it to thy Face*; Action lies, though it is not said she did it voluntarily; but it is so intended by common Acceptance, but it must be averred that he was dead before

before the Words spoken. 1 Roll. Abr. 71. Gardner and Spurdance.

If the Plaintiff declare that the Defendant spake these Words of her, *Thou art a villainous Quean, and a murtherous Quean, for thou didst murder my Wife*; and the Jury find she spake the Words of the Defendant in the third Person, *She is a villainous Quean, &c.* This is a material Variance, and cannot be intended the same Words. 2 Roll. Abr. 716. Blisset's Case.

Mrs. P. wrote a Letter to one to poison her Husband; Action lies for these Words, cited in Dean and Eaton's Case. 1 Bulst. 201.

Wallis's *Wife is thy Whore*; no Action lies at Common Law, but in Spiritual Court: But to say, *One keeps a Bawdy House*, is actionable at Common Law. Sid. 61. Wallis's Case.

Thou art an Whore, and I will throw thee out of thy Living, (viz. Copyhold,) and she was posselt of a Copyhold *dum sola & casta*; it is actionable. Sid. 214. Boy's Case.

She is an Whore and her Children (innuendo which she had by her former Husband) *are F.'s Bastards*; the Words are actionable, though the Children cannot be Bastards in Law, but in Reputation they may, and it's Loss of Marriage. Cro. Car. 322. Bryan and Cockman.

She was with Child, and miscarried at C. N. his House: Words spoken of a Virgin; per quod she lost Suiters, and was threatned by her Father to be turned out of his House; but no particular Damage assigned: Not actionable. Sid. 398. Barnes and Brudlin.

Thou art an Whore-master, for thou hast lain with Brown's Wife, and hadst to do with her against a Chair; per quod, &c. Judgment pro Quer'. Cro. Jac. 323. Matthews and Craple.

Action on the Case for saying, *He had two Bastards, and should have kept them.* By which Discord arose between him and his Wife, and they were likely to be divorced; not actionable, for it is but an Imagination of being divorced. Cro. Jac. 473. *Barmund's Case.*

He hath three Wives: Actionable and within the Statute.

What do you mean to entertain him, for he was a very harsh Man to his former Wife, and would not allow her Necessaries, and is of a small Estate: Per quod the Wife refused him, and the Words adjudged actionable. *Shepherd's Case*, cited Litt. Rep. 193.

Of a Woman who was in Communication of Marriage, *She is a Bursten-belly'd Quean, and her Guts hang down to her Garters;* adjudged actionable. *Harvey's Case* cited in *Bridge and Langton's Case.* Litt. Rep. 193.

The Plaintiff brought her Action on the Case, for that the Defendant had falsely and maliciously written a Letter to one who was about to marry her, wherein he had used these Words, *You ought not to marry her, for before God she is my Wife; and therefore if you do, you will live in Adultery with her, and your Children will be Bastards,* by Means whereof the Plaintiff lost her Marriage: It was moved in Arrest of Judgment, that these Words were not actionable; but the whole Court of B. R. resolved that they were actionable, by Reason of the Words *false & malicious* laid in the Declaration, and found by the Jury. *Shepherd vers. Wakeman.* 1 Sid. 79.

Action for Words where by she lost her Marriage.

A Feme Sole brought her Action against the Defendant; for that whereas one *Blake*, seized of Lands to such a Value, sought to have her in Marriage; the Defendant said she had a Bastard,

tard, whereby the Plaintiff lost her Match with the said *Blake*, and also became in Danger of the Statute. And after Verdict for the Plaintiff and Motion in Arrest of Judgment, the Court affirmed the Judgment. 2 Sid. 21.

Where Baron and Feme must join in the Action or not, and how Judgment shall be.

Where Wife is found guilty only, yet the Judgment was against Baron and Feme.

Action on the Case was brought against *V.* and his Wife, for Words spoken of the Plaintiff by the Defendant's Wife: Upon not guilty, Verdict was for the Plaintiff, and Judgment given, and a Writ of Error brought: And this Exception was taken, That the Verdict found the Wife only guilty, and yet the Judgment was given against Baron and Feme. *Per Glyn Chief Justice*, The Jury have found the Wife guilty, and so the Declaration is true, and therefore just Cause of Action, and the Judgment well given. *Style, p. 460. Abbot and Vaughan.*

C.'s Wife is a Bawd, and keeps a Bawdy House: They join in the Action, and conclude *ad damnum ipsorum*, and good. *Chambers and his Wife vers. Risley, March p. 212.*

Declaration.

In Action against Baron and Feme if the Plaintiff declare, that they *dixerunt* of the Plaintiff certain scandalous Words, such a Day and Year: If the Defendants plead Not guilty, and the Jury find the Husband guilty, and the Wife not guilty, in this Case the Plaintiff shall have Judgment; for although the Words by the Baron and Feme may not be jointly spoke, inasmuch as they have two Mouths, and the Speaking of the one is not the speaking of the other, so that it shall be taken that the Words were severally spoken at the same Time; in which Case the Action ought not to be brought against both,

both, inasmuch as if they had been both found guilty, there ought to have been two Judgments, one against Baron and Feme, and the other against the Baron only, which is not to be suffered upon one Writ; and therefore if the Plaintiff had demurred upon this Declaration, it had not been good; yet when the Wife is found not guilty, there need not be but one Judgment, *viz.* against the Baron; and for this the Verdict had made it good, and so the Plaintiff shall have Judgment against the Baron. 1 Roll. Abr. 782. So is Style, p. 349. *Butcher and Orchard.*

H. 32 El. B. C. *Fisburne's Case.* Baron and Feme and their Son brought Action on the Case for saying, *That they had committed Treason for coining of Money*; and adjudg'd, no Action lies. Action on the Case for slanderous Words spoken by Baron and Feme lies not, for they cannot speak together. *Dyer 19. Margine.*

Action for Words spoken against Baron and Feme for Words laid to be spoken by the Wife: Upon not guilty pleaded, a Verdict was found for the Plaintiffs, *Quod ipsi non sunt inde culpabiles*, and good, and it is no Error. 3 Bulst. 62. *Quelsb and Ux. vers. Carpenter.*

Quod ipsi non sunt culpabiles.

In Action on the Case against Baron and Feme for Words spoken by the Wife: The Baron is to be found not guilty, because nothing is laid to his Charge; and if they are both found guilty, as to the Husband the Verdict is void, but good as to the Wife alone. 3 Bulst. 60. *Verdict.*

Action on the Case by a Victualler for saying of his Wife, *She is a Bawd of Bawds, and a Bawd to her own Daughter*; and special Damage, *Quod ad damnum ipsorum.* 1 Cro. 419.

The special Damage is only the Husband's, and *Ad damnum ipsorum.* the Action would not lie without the special

Damage; and Judgment was stayed; they ought not to have joined; had the Damage been laid *per quod* he lost *Consortium* of the Wife, they could not join, *French and Lever in B. C. 1 Keb. 791. Coleman and Ux. vers. Haroll.*

Error on a Judgment in C. B. was, That the Baron and Feme should recover, and it was assigned for Error in B. R. because the Baron only is to have the Damages; and yet Judgment was affirmed by the whole Court. *Godh. 369. pl. 459. Litchfield and his Wife vers. Mellhouse.*

So Case by Baron and Feme of Words spoken of the Plaintiff's Wife *ad damnum ipsorum*, and Judgment was stayed after Verdict *pro Quer.* 2 *Keb. 387.*

In *mi'a.*

When Judgment is given against Baron and Feme for Words spoken by the Feme, both must be in *mi'a.* *Hob. 127.*

Release.

Suit for Defamation.

If A. a Feme Covert, speak scandalous Words of B. another Feme Covert; and after the Husband of B. makes a Release of this to the Husband of A. and after sues B. in Court Christian for this Defamation, and there the Release of the Husband of B. is pleaded; and notwithstanding Sentence is given there for A. and Costs taxed, and upon this an Appeal; yet no Prohibition lies as to this Matter, because there they have Jurisdiction of the Cause, and also of the Manner of Proceeding: But a Prohibition lies as to the Costs, for the Costs shall go to her Husband, who had made the Release. 2 *Roll. Abr. 301. Perry and Hubbard.*

Where the

Wife may sue
Sole.

The Wife sues in Court Christian, for a Defamation, (as she may sue Sole there) and the Husband and the other refer themselves to the Award of J. S. who makes an Award; and this is pleaded in Court Christian, and not allowed;

lowed; yet a Prohibition was denied, because this Suit is only to restore her to her Fame, which the Husband cannot hinder. 2 *Roll. Abr.* 301. *Pannell and Watford*; and so is *Motam's Case* there, where the Wife, after *Divorce causa Adulterii a Mensa & thoro*, sues for Defamation.

Action for Words against Baron and Feme. Defendant pleads *quod ipsi non sunt culpabiles*, *non sunt culpabiles.* and found *pro Quer.* Moved in Arrest of Judgment, because Issue was not well joined; for being for Words spoken by the Wife, it ought to be *quod ipsa non est culpabilis; Sed non alloratur*; for the Baron and Feme are charged as for the Wrong of the Wife. *Cro. Car.* 417. *Needler* against *Symel* and his Wife.

C H A P. XXVIII.

Actions against Baron and Feme. Trover, Debt, Trespass, Actions on the Case, Waste, Covenant, Account, Audita Querela, with the Manner of Declaring and Pleading in each Action. Actions against Baron and Feme by reason of Offences against a Statute. Information against Baron and Feme for the Recusancy of the Wife by the Stat. 1 Eliz. & 23 Eliz. In what Actions the Husband shall be charged after the Death of the Wife. Where the Default of the Wife shall be the Default of the Husband, and e contra. Where the Wife shall be received upon the Husband's Default. Wager of Law by Baron and Feme. In what Cases the Husband shall appear, and be compelled to put in Bail for his Wife or not. Of Baron and Feme being sued to the Outlawry, and how the Entry shall be.

Trover.

Trover by the Feme, and Conversion against Baron and Feme.

TROVER by the Feme, and Conversion by the Baron and Feme. The Action must be brought against them both. 1 Leon. p. 312. and not against the Baron only, for the Action doth sound in Trespass; and it is not like to Detinue, for upon Detainer by the Wife, the Action lies against the Baron only. *Marsh's Case.*

Whether the Wife may be said to convert Goods.

Whether and how the Wife may be said to convert Goods, hath been a Question in our Books. *Mich. 7 Jac.* Trover was brought against Baron and Feme, and Plaintiff declares he was possessor of divers Goods *in Specie* until such a Day, and lost them, which came to the Possession of both the Defendants, and they converted

verted them *ad damnum*, &c. And upon not guilty pleaded, found *pro Quer.* Exception was taken to the Declaration, because the Conversion is laid to the Charge of the Wife as well as to the Charge of the Husband; and Feme Covert may not convert Goods, but it shall be said the Conversion only of the Husband, forasmuch as she cannot have Property, but all is in the Husband. To which it was answered by *Telverton*, That this Action is not grounded in any Property supposed to be in the Defendants, but upon the Possession only; and the Point of the Action is the Conversion, which is a Tort with which a Feme Covert may well be charged, as well as she may be charged with a Trespass, or a Disseisin committed. And if a Feme Covert take my Sheep and eat them, or other Goods, and convert them, I shall well have this Action against Baron and Feme; and suppose the Conversion in the Wife only, (*viz.*) the Tort. But Baron and Feme may not have Action of Trover, and suppose the Possession in them both, for the Law transfers all in Point of Ownership to the Husband: *Quod fuit concessum per Curiam.* But this seems not to be Law; for in *Berry and Neve's Case*, 20 Jac. 1. Cro. Jac. 661. an Action lies not against Baron and Feme for converting Goods to their Uses, for it is the Conversion of the Husband only, and they are only to his Use; and although they may be charged with a joint Battery or Imprisonment, yet it cannot be so for Goods converted; and the Judgment shall not be reversed *quoad* the Wife.

And yet in *Rhemes and Humphreys's Case*, Cro. Conversion ad Car. 254. Trover was brought against Baron and Feme for Conversion by Baron and Feme *ad usum ipsum*: On not guilty, both are

found guilty, and Damages assessed. It was moved in Arrest of Judgment, That the Action lies not against Baron and Feme jointly for Conversion to their Uses during the Coverture; for when they join it is the Act of the Husband only, and the Feme cannot convert to her own Use: But Action of Trover well lies for Conversion by the Feme before Coverture, or by the Feme only during the Coverture, for she may do a Tort solely, and the Husband shall be joined with her, but not where she joins with her Husband; and Judgment was given for the Defendant. *Cro. Car. 254.*

Trover was brought against Baron and Feme, and that they converted them *ad usum ipsorum*, and for that Cause Judgment was reversed; for a Feme Covert cannot convert to the Use of the Feme, but all is done to the Use of the Husband. *Cro. Car. 494. Perry and Diggs*, though it was alledg'd in such Case. *1 Vent. 33.* when it was *ad usum proprium converterunt*, that *proprium* might be applied to the Use of the Husband only, and so it had been *ad usum suum*. But *per Curiam*: Neither had been good; so was *Gallop's Case*, *Style 136.* And it was prayed that Judgment be entered, *quod querens nil capiat per billam*; for if it be *quod defecit inde sine die*, the Plaintiff could not have brought Action *de novo*.

Quod ipsi
non sunt cul-
pabiles.

Trover was brought against Baron and Feme supposing the Trover to be by both, and the Conversion by the Feme only. The Defendants plead *quod ipsi non sunt inde culpabiles*: After Verdict *pro Quer'* Judgment was stayed, in as much as the Declaration doth not charge the Husband with any Tort, but only the Wife, the Issue ought to have been *quod ipsa non est inde culpabilis*. *Gr. El. 883. Gen and Croft-
nell;*

well; and so a Répleader was awarded after Verdict.

If the Wife take Corn and make Bread, and eat the Bread, this is the Trover and Conversion of the Husband; so if she buys Cloaths, and makes a Garment and wears it, the Baron and Feme shall be charged in Trover and Conversion. *Siz. 113.*

Trover against Baron and Feme of the Trover of the Wife, and Conversion of the Wife during the Coverture. The Defendants pleaded not guilty, and found against them. The Judgment was, That the Feme sit in misericordia; where it ought to be that the Baron and Feme sit in misericordia; for she cannot pay it without her Husband: And it was erroneous also, because the Baron pleads with the Wife, and does not confess the Action, for that is the Cause of the misericordia. Also the usual Course is in Actions against Baron and Feme for Trespas done by the Feme during the Coverture, if they be thereof convicted, to have the Judgment *ideo capiuntur* against both; yet this is no Offence against the Baron himself: And by all the Clerks this is their Course. *Cro. Jac. 9. Wood and his Wife vers. Dr. Sutcliff.*

Debt.

Baron and Feme cannot be joined in one Action of Debt against them for several Contracts, the one made by the Wife *dum sola*, the other by the Husband, as was *Revell and Gray's Case*. *Revell* brought Action of Debt against *Gray* and his Wife for 3 l. 18 s. and declared for 39 s. upon the Wife's Contract *dum sola* fait, and the other 39 s. upon an *Infimus computaverunt* with *Gray* the Husband: After Issue joined,

On several Contracts, the one made by the Wife dum sola, the other by the Husband.

beat the Plaintiff, or the Mare of the Plaintiff; and on not guilty, the Jury found the Feme only did the Battery, and not the Husband: This Verdict was there said to be against the Plaintiff; for now it appears the Action of the Plaintiff to be *faux*, for the Husband shall be joined in such Case but for Conformity, and there is a special Writ in the Register to such Purpose. And it is not like to a Battery charg'd upon J. D. and G. S. for there one may be found guilty, and the other acquitted, and good; for these are in Law several Trespasses: But the Court in the principal Case gave Judgment *pro Quer'*, and said that in *Telverton* was a strange Opinion. 1 *Vent.* 93. But Action of Assault and Battery for beating the Baron and Feme, upon Not guilty pleaded, the Defendant was found guilty of beating the Wife only, and nothing was found concerning the Battery of the Baron. *Per Curiam*: If *non cul'* had been found as to the Husband, it had been well; but here is a *non Liqueat* as to him, *vide* 10 Co. 130. b. and took a Diversity between their being Plaintiffs and Defendants; for if there be a Mistake as to one of the Defendants, it may be well; as in Action on the Case brought against Baron and Feme for Words spoken by them both, and the Baron be found not guilty, and the Wife guilty, it is well. But afterwards it was he'd a void Verdict, because one Part of the Issue was found, as 1 *Inst.* 227. and there is no Discontinuance, for the Whole is continued; and by Ch. Baron Bridgman, *Venire de novo* awarded. *Hard.* 166. *Rochell* and his Wife against *Stedle* and his Wife.

Verdict void.

The Wife cannot plead by herself.

In Battery against Baron and Feme, the Baron pleads generally Not guilty; and the Baron and Feme, *quoad* the Wounding, plead Not guilty,

guilty, and *quoad* the Battery, the Wife pleads in Justification, *Et hoc parata est verificare*, where it ought to be *parati sunt*. *Cra. Car.* 594. *Watkinson and Turner*, in such Case. *Cro. Jac.* 239. *Watson and Thorne*; the Baron justified, for that the Plaintiff assaulted his Wife, in Aid of whom, &c. the Feme justifies by herself, and pleads *son assault demesne*. Plaintiff replies, *De injuria sua propria absque tali causa*; and both Issues found for the Plaintiff, and intire Damages. *Per Curiam*: It is ill, for the Wife by herself cannot plead; and the Damages being intirely assessed, all was ill.

Assault and Battery by Baron and Feme against Baron and Feme, for Battery of the Plaintiff's Wife: Upon Not guilty pleaded, it was found the Baron was not guilty, and the Wife was only guilty; and the Judgment was *quod Capiantur*, and good. *Cro.* 203. *Hales and White.*

Quod Capiantur.

Trespas was brought for mean Profits. The Count was against Baron and Feme for Trespas done *cum averiis suis*, and saith not whether they were their Beasts after, or hers before Coverture. *Per Curiam*: It is good enough after a Verdict; for she may be Executrix, and so by Marriage they may be his Goods, but then the Actions should have been several, according to their several Capacities: And if the Goods of an Executrix, after taking Husband, be stole, the Indictment must be of taking his Goods. 1 *Keb.* 944. *Collingwood and Bishop.*

Trespas for mean Profits.

Note; In *Trans. ad novam assignac'* Def. placitat *Libertum Tenementum ipsius Defendantis & E. Ux. ejus in jure*; &c. *Ad quod quer' dicitur quod ipse fuit seifitus quousq; disseit' per le. Baron ad usum Ux. per quod fuer' seifu' per disseifinam & quod disseifee reenter, & Tresp. nul faciend' mentionem de Agreement del Feme ab dissei.*

*dissei. Qu'. Car aliter de estranger. Def' men-
teyne son Frehold & traverse le disseisin. Ex
Manuscripto Mri' Brownloe:*

Action on the Case. Vide Words.

*For negligent
keeping of Fire.*

Action on the Case doth not lie against Baron and Feme for negligent keeping of Fire in their House, by which the House of the Plaintiff was burnt; for this Action lies, by the Custom of the Realm, against *Patremfamilias*, and not against a Servant, or a Feme Covert, who is in the Nature of a Servant. 1 Roll. Abr. 2. *Shelley's Case*.

Feme Covert, and another at her Request, are bound in a Bond for the Debt of a Feme Covert, and after the Death of her Husband she had assumed to save the other harmless against that Bond; this *Assumpsit* shall not bind the Wife. *Godb. 138. in Barton and Edmond's Case. Ali-* ter in Case of an Infant.

*Feme Covert
affirming her-
self to be a
Feme Sole, to
intice to Mar-
riage.*

Action on the Case brought against Baron and Feme; because the Wife affirmed herself to be a Feme Sole, to intice the Plaintiff to marry her; Action lies not against Baron and Feme, because it is Felony; and all the Ground of this is the Contract and Communication of the Wife, which cannot bind her Husband. *Sid. 375. Cooyer and Witham and his Wife.*

Waste.

Waste lies not against the Husband for Waste committed by him in the Time of his Wife. Feme Tenant for Life takes the Defendant to Husband, who committed Waste, and his Wife died, and Action was brought, and it was not brought in the *Tenet*, nor the *Tenuit*; and there-
fore

fore the Writ of Waste is not good, because it is variant from the Register; for it ought to have been the one way; and to make his Count special, and the Form of the Count was ill, because the Writ supposeth that the Baron *fecit vastum*; whereas the Baron being charged as Tenant in the Right of his Wife, the Writ ought to have been *fecerunt vastum*. And the Court was of Opinion, that the Writ lies not against the Baron for Waste committed by him in the Time of his Wife; for he is to be charged by Reason of his Wife, and jointly with her, and she being dead, the Action is gone; for it is but a personal Wrong done by her, tho' the Prothonotaries informed the Court that such Action had been brought against the Baron, and the Writ was *quod tenuit in jure Uxoris*, which the Court marvelled at. *Cro. Eliz.* 357. and

Writ and Count.

so *1 Inst.* 54. Baron seised for Life of the Wife, and in the Right of the Wife, doth waste, and after the Wife dies, no Action of Waste lies against the Husband in the *Tenuit*, for that he was seised but in the Right of his Wife, and the Freehold was his Wife's. But if Baron, possessed for Years in the Right of his Wife, doth waste, and the Wife dies, Action of Waste lies against the Husband, for that the Law gives the Term to him. *5 Co.* 75. *b.*

Baron seised in Right of the Wife, doth waste, Feme dies, and he shall not be charged.

A Lease for Life is made to *A.* the Remainder to a Feme Sole for Years, they intermarry, Waste is committed, Lessor brings Action of Waste; he shall recover as well the Estate for Life, as for Years. *2 Leon.* *p.* 7.

If a Woman, while she is Sole, commits Waste, and marries, the Writ shall be, that the Woman, while she was Sole, committed the Waste.

Feme Sole commits Waste, and then marries.

A Man gives Land to his Wife during the Minority of his Son, on Condition that she shall not

not

not make Waste; she takes Husband, who commits Waste; this is no Breach: *Latch 20. in Webb's Case, 2 Leon. 35. Cobb and Priour.*

If a Man have Land in the Right of his Wife, and commits Waste, and the Woman dies, no Action of Waste lies against the Husband after the Death of the Wife. *1 Brownl. 238, 239.*

Baron and Feme shall be punished in Waste for Waste made by a Stranger. *1 Inst. 54. b.*

*Stat. Glou',
cap. 5.*

Feme Lessee for Life taketh Husband, the Husband doth Waste, the Wife dieth, the Husband shall not be punished by this Law of *Gloucester, cap. 5.* for the Words be *homo quætient, &c. per viam*; and the Baron held not for Life, for he was seised in the Right of his Wife, and the Estate was in his Wife. *2 Inst. 301.*

If Feme Lessee for Life takes Husband, who doth Waste, Action lies against them both. *33 H. 6. 31. 17 Ed. 3. 68. b.*

If Feme Lessee for Life takes Baron, who commits Waste, and dies, Action of Waste lies against the Wife for this.

Covenant.

Upon a Warranty in a Fine *per Concessit.* Vide *supra, Per Hale's Case, 2 Saund 177.*

Account.

Action of Account was brought against a Feme Covert Administratrix and her Husband in B. C. and Judgment given against the Defendants *quod computent.* The Feme dies, and the Baron brings a Writ of Error in B. R. to reverse this Judgment. *Per Cur'.* This Writ

of Error lies not, because the Record cannot be removed by it, for that would disturb the Proceedings in the Common Pleas, and the Party would have no Fruit of his Suit if the Record were removed, nor any Remedy to recover the Arrears due to him; yet the Original is determined by the Judgment given *quod computent*, and a *Scire fac* lies by the Executor, as the Case here is. *Style 290. Spittle-house Case.*

Audita Querela.

Baron and Feme sue Execution after a Defeasance: On a Statute made to Baron and Feme, *Audita Querela* should be brought against both, *1 Roll. Abr. 312.* although the Defeasance be void as to the Wife; for the Action is in Lieu of an Answer to the Execution which is sued by both, and it is all one as if the Baron alone had made the Defeasance, which should be a sufficient Discharge. *11 Ed. 4. 8. b.*

Actions against Baron and Feme upon Offences against a Statute. Vide Offences.

Information for Recusancy.

The Baron is not to be joined where Fine and Imprisonment is to be; but on the Statute of Recusancy, or keeping Ale-houses, the Husband must pay the Fine, therefore must join, for it cannot be levy'd on her, though she commit the Fault. *2 Keb. 468.*

Information lies against Baron and Feme for the Recusancy of the Wife, to recover 20 *l.* the Month, by the Stat. of *Elix.* And the Stat. 7 *Jac. cap. 6.* doth not alter any of the former Laws, but prescribes, that a Feme Covert Recu-

tant being convicted, if she after three Months do not conform herself, she shall be committed to Prison; unless the Husband will pay 10 l. for every Month that she shall be out of Prison, and not conformed. The Plea on Record is, *Et præd J. C. & Magdalene veniunt: Et præd Magdalene dixit quod ipsa non est culpab. &c.* and a Plea by a Feme Covert is void; but the Docket otherwise, and it was amended. *Cro. Jac. 529. Parker and Sir J. Curson's Case.* The Question in *Parker and Webb's Case*, *Cro. Jac. 480.* was, Whether a Feme Covert being convicted by Indictment at the King's Suit, be liable to the Suit of an Informer, upon the Stat. 23 *Eliz.* after the Year that she was convicted? *Vide*, for it was not determin'd.

It is resolved; That the Husband is liable to the Penalty of 23 *Eliz. cap. 1.* of 20 l. per Month, though he himself be no Recusant. 3 *Bull. 87. Le Roy versus Law.*

If Baron and Feme be sued in Debt for the Recusancy of the Wife, both must appear, or both be outlaw'd. *Hob. 174.*

A Feme Covert affirms she is Sole, and induceth J. S. to marry her; no Action lies against the Husband. 2 *Reb. 399.*

Stat. 1 *Eliz.*
& 23.

Feme Covert is within the Stat. 1 *Eliz.* and the Stat. of 23 *Eliz.* refers to the first, and therefore a Feme Covert is *deins* Stat. 23. and therefore she shall forfeit for every Month 20 l. and this may be recover'd by Information against Baron and Feme, as was resolv'd 35 *Eliz.* at *Russel-house*, by *Puckering* Lord Chancellor, and all the Justices; but there it was resolved,

If Feme be indicted for a Thing, the Husband shall not be charged.

If a Feme Covert be indicted for this at the King's Suit, the Husband shall not be charged, because he was not Party to the Judgment; for if a Feme be indicted for any Thing, the Husband

band shall pay nothing, because he is not Party to the Judgment; but otherwise it is for Actions of Battery, and for Words, because the Husband there is Party to the Judgment; so it is also where the Informer informs, and this was the Cause of making the Stat. of 35 Eliz. by which Statute the King may have Action of Debt, and so recover the Penalty against the Husband. 1 Roll. Rep. 93. Dr. Foster's Case.

By the 3 Jac. 1. cap. 5. no Person, whose Wife is a Popish Recusant Convict, shall exercise any publick Office by himself or Deputy, unless he with his Children and Servants repair to Church, and receive the Sacrament at such Times as by Law are limited. *Husband of a Popish Recusant Convict, disabled to bear Office.*

Every Woman being a Popish Recusant Convict, (whose Husband is not) which shall not go to Church, and receive the Sacrament, as the Law requires, by the Space of one whole Year next before the Death of such Husband, is disabled to be Executrix or Administratrix of her Husband, or to demand any Part of her Husband's Goods or Chattels; and also shall forfeit two Thirds of her Jointure or Dower. *Feme Recusant Convict shall not be Executrix or Administratrix to her Husband, or have any Share of his Goods, and forfeit the Third of her Dower.*

A Popish Recusant Convict, who is marry'd otherwise than in open Church, and by a lawful Minister, according to the Church of England, shall not be Tenant by the Courtesy: The Woman marry'd otherwise than as aforesaid, is disabled to enjoy her Dower, Jointure, Widow's Estate, or any of her Husband's Goods. *Recusant Convict marry'd out of the Church of England, shall not be Tenant by the Courtesy. The Feme shall not have her Jointure or Dower.*

Where the Man cannot be Tenant by the Courtesy, he shall forfeit 100 l.

**Feme Convict
not conforming
in 3 Months
after Convic-
tion, to be com-
mitted to Pri-
son.**

By 7 Jac. 1. cap. 6. A marry'd Woman being a Popish Recusant Convict, who shall not, within three Months Time after her Conviction, conform, repair to Church, and receive the Sacrament, shall be committed to Prison, and there remain; unless the Husband shall pay to the King 10 *l.* a Month, or a third Part of the yearly Value of his Lands, at the Election of the Husband.

**Person marry-
ing a Papist,
shall not enjoy
the Crown.**

By 1 & 2 W. & M. Sess. 2. cap. 2. Every Person who shall marry a Papist, is excluded and made for ever incapable to inherit, possess or enjoy the Crown of this Realm. And in such Case, the People are thereby absolved from their Allegiance.

*In what Actions Husband shall be charged after
the Death of the Wife, or not.*

**1 Roll. Rep.
351, 352.**

If Feme Lessee for Life, rendring Rent, takes Husband, and dies, the Husband shall be charg'd in Action of Debt for Rent incurred during the Coverture, because he took the Profits out of which the Rent issued. 10 H. 6. 11.

If a Woman be indebted to another, and takes Husband, and dies; the Husband shall not be charged in Debt for this after the Death of the Wife, because it was but a *Chose in Action*. 10 H. 6. 10, 12. 20 H. 6. 22. b.

If Feme Lessee for Life takes Husband, and dies, the Husband shall not be charged for this during the Coverture, for he was never Lessee. 5 Co. Foliamb's Case.

If A. take B. Executrix to Wife, against whom Action of Debt is afterwards brought as Executors, and Judgment given against them to recover *de bonis Testatoris*; and upon this a *Fieri fac'* issues to levy the Debt and Damages; and

and the Sheriff upon this returns a *Devastavit*, and after the Wife dies, it was doubted in *Trotman and Jane's Case*, whether Execution upon this Judgment may be sued against the Husband, there not being any Judgment upon the Return of the *Devastavit* to recover *de bonis propriis*. 9 Car. B. R. Vide as to this *supra*.

Process.

Where the Default of the Wife shall be the Default of the Husband, and e converso.

Where the Husband is to have a corporal Penance for the Default, there the Default of the Wife shall not be the Default of the Husband. 11 H. 4. 7. 9 H. 6. 8. As if on a *Pluries capias* the Husband appears, and the Wife makes Default, this shall not be the Default of the Husband for the corporal Pain. So in *Capias*, if the Husband make Default, and the Wife appear. So if upon the Exigent the Baron and Feme have a *Supersedeas*, and notwithstanding this they are returned outlaw'd; and at the Return the Baron appears, and the Wife makes Default, this shall not be the Default of the Husband for the corporal Pain. 9 H. 6. 8.

But otherwise it is where the Baron is not to have a corporal Pain by the Default. 11 H. 4. 12. As if Baron and Feme are attached in a Trespass, the Default of the Wife is the Default of both, and so the Issues forfeit. In Assise the Default of the Wife shall be the Default of the Husband.

In Action of Debt against Baron and Feme, if the Baron appears, and the Feme make Default, the Baron shall not be put to answer, but

Process shall issue against the Wife, and *idem dies* given to the Husband. *M. 11 Jac. B. Thoroughgood and Dunham.*

If Action of Waste be brought against Baron and Feme, and the Baron appear upon the *Distingas*, and the Wife make Default, this shall be the Default of them both. *1 Brownl. 239.*

Rescript.

Where the Wife shall be received upon the Husband's Default, and contra.

In every Case that the Wife is received for Default of her Husband, she shall plead, and have the same Advantage in pleading to defend her Right, as if she were a Feme Sole; but after Receipt she cannot levy a Fine, for that were to give away her Right. *1 Inst. 352. b. Vide 2 Inst. W. 2. cap. 4.*

After a Verdict against Baron and Feme, the Wife cannot pray to be received. *Hob. 177. Bell and Hartley.* This was in Action of Waste.

A Rescript shall be by Termor or Feme Covert, after a *Nihil dicit.* *9 Ed. 4. c. 37.* And a Rescript shall be by a Feme after a Writ of Enquiry of Waste returned, and the Waste required. *Cro. Eliz. 263. Elmer and Thackam.*

In *Formedon* the Tenant pleaded *Non-tenure*, and found for the Demandant; and now the Feme, after Verdict, pray'd to be receiv'd upon the feint Plea of her Husband, because he had pleaded *Non-tenure*, where she might have traversed the Gift, and he brought a Writ out of Chancery, *de Attornat' recipiendo* for the Feme. And *per Curiam*: It was received, for false Pleading is feint Pleading, and feint Pleading is within the Statute; and here needs not any new Decla-

Declaration, because the Feme is Party to the Suit; *aliter*, when he in Reversion is Party to the Suit, and is received. *Cro. Eliz.* 826. *Greswold and Holmes.*

Baron and Feme Joint-tenants for Life, the Baron sole is impleaded, and made Default, and the Wife pray'd to be receiv'd; but she is not receiveable, because she was not Party to the first Writ; but he in Reversion shall be received, and shall abate the Writ for Joint-tenancy. *Moor* 242. *Caine's Case.*

Feme Covert hath a Reversion, and Tenant for Life is impleaded, and she conceives her Husband will not pray to be receiv'd; she may have a Writ directed to the Justices, testifying therein, that she will make such Attornies jointly and severally, commanding the Justices to receive them for Attornies; and it must be mention'd in the Writ that she is decrepit, &c. and cannot come in Person, and pray to be received.

Ley Gager.

Debt against Baron and Feme for certain Barrels of Beer sold to the Wife *dum sola fuit*. They both waged their Law, and both Baron and Feme did swear according to the Form of the Oath. *Quod nota*, The Baron did swear for the Debt of the Wife. *Cro. Eliz.* 161. *Weeks versus Holmes and Ux.*

Baron and Feme both wage Law.

Account of the Receipt of 10 l. by the Hands of the Plaintiff's Wife. The Defendant waged his Law, because a Receipt by the Hands of the Wife of the Plaintiff or Defendant, is all one as Receipt by their own Hands. *Cro. Eliz.* p. 919. *Goodrick's Case.*

The Husband and Wife of full Age for the Debt of the Wife before the Coverture, shall make their Law. 1 Inst. 172. b.

In what Cases the Husband shall be compelled to appear and put in Bail for his Wife, or not.

Husband to remain in Prison till he puts in Bail for his Wife; in what Case, or not.

In Action (as Debt) against Baron and Feme for the Debt of the Wife; if the Husband be taken by *Capias* or *Exigent*, he shall remain in Prison until he puts in Bail for his Wife: And by the Clerks, it is a common Course. But in Action against Baron and Feme in *Banco*, if the Husband comes in upon the *Capias* or *Exigent*, he shall not be compell'd to put in Bail for his Wife.

If the Husband appear upon the Original in *B. R.* where it is against Baron and Feme, he ought to put in Bail for his Wife.

If a *Latitat* issue against Baron and Feme, and the Wife is arrested, but not the Husband; the Husband in this Case shall not be compell'd, by the Course of the Court, to appear for himself and his Wife, the Husband not being arrested. *Per Curiam*: And the Clerks in *Story* and *Smith's Case*, *M. 10 Car. B. B.* but they say, that if the Husband had been arrested, but not the Wife, the Husband shall be compell'd to appear for himself and his Wife.

In Action of Debt against Baron and Feme in *B. R.* upon the Statute of Recusants for the Recusancy of the Wife; the Husband, who is in *Custod' Mar'* shall remain in Prison, unless he puts in Bail as well for himself as his Wife. 37 *Eliz. B. R. Philpot and Young*: But it is in the Election of the Court, whether they will compel him to give Bail for his Wife, or not; for all

all Bails are in the Discretion of the Court ;
so *Hob.*

Lovedon's Case. In Debt for the Recusancy of the Wife, the Husband may not appear by *Supersedeas* only ; for either they ought both to appear, or both be outlaw'd.

Latitat was sued against J. S. and A. S. Baron and Feme, by T. D. The Wife was arrested, but the Baron could not be taken. The Sheriff returned *Cepi Corpus* for the Wife, and *non est inventus* for the Baron. And the Court held nothing could be done in this Case, unless there were Bail put in by the Husband ; for the Feme, without the Husband, cannot be sued, nor can put in Bail ; and against the Husband, unless he be first taken, and put in Bail, there cannot be any Declaration ; and therefore in this Case, in regard the Plaintiff cannot declare, the Feme was dismissed ; and it was said, he ought to sue them by Process of Outlawry, and by that Means he might have Remedy : For it were a great Mischief that a Feme Covert should intermeddle, and merchandize, and procure Goods into her Hands ; and the Baron absenting himself, or keeping in his House, there should be no Remedy against them. *Cro. Jac. 445.*

Latitat against J. S. and his Wife, the Wife was arrested, but the Husband could not be taken.

Remedy by Process of Outlawry.

The Court of *King's Bench* was moved on the Behalf of the Lady *Baltinglass*. There was an Action on the Case brought against Baron and Feme, and the Feme appeared, and the Husband would not, and that the Plaintiff's Attorney stood to have special Bail for her, which she could not procure ; and therefore it was pray'd she might be deliver'd on common Bail : But by *Glyn* : If there be Cause to have special Bail, the Wife must lie in Prison until the Husband appear, and put in Bail for her ; for she can-

cannot put in Bail for herself, she being a Feme Covert. *Style* 475.

Action of Debt against Baron and Feme upon the *Latitat*. The Feme appear'd, she shall be accepted, *per Curiam*; but where the Feme is in Execution, she shall not be discharg'd, nor could the Lady *Baltringlass*, who was in *Custodia* only upon Process: But *per Curiam*, She ought to be discharged, and that without Bail, if it appear upon the Writ that she is a Feme Covert; but if she be sued as a Feme Sole, she cannot put in Bail. And by *Twisden*, It is an unreasonable Course, that Wife because she cannot appear by *Reddidit se*, but in *Custodia*; therefore she should not be dismissed as in *B. C.* else would this be as good as a Divorce, a continual *Non est inventus* being returned against the Husband, and no Declaration can be against her, and so she shall be always in Prison. And this being but an Arrest on mean Process, and to say she is in *Custodia*, is no Reason, because when he comes in he shall find Bail for himself and his Wife, and so the Plaintiff may declare against them both in *Custodia*. *Per Curiam*: She was discharged. Three Opinions have been in this Case: 1. That she should lie in Prison till the Husband come in; and that is unreasonable. 2. That she ought to file common Bail, if another will be bound for her, which may prevent a Fraud in arresting of her at the Beginning of a long Vacation; this the Court conceiv'd reasonable; but it is at the Election of the Wife, whether she will or not. 3. That she ought to be discharged without Bail, which the Court conceiv'd reasonable, and so awarded here. 1 *Keb.* 187, 188. *Bare* and *Desmond*.

Feme Covert appeared on the Latitat: Qu. If she shall be dismissed?

In Action against Baron and Feme, and the Feme was an Infant, and the Wife appeared *per Attornat'*; whereas the Court ought to have admitted her *per Guardian'*; and for this it was reversed; but if the Wife be of Age, then the Baron makes Attorney for her and himself, and the Entry is *per Attornat'* of the Husband and Wife; and by *Hale*, The Husband cannot disallow the Guardian made by the Court for his Wife. 1 *Vent.* 185. *Freeman and Reddyle.* Entry as to Appearance.

Suit against Baron and Feme; the Feme is arrested, and giveth Bond for her Appearance, and now pray'd to be deliver'd on common Bail. The Sheriff having return'd *Cepi Corpus* of the Baron and Feme, both having only taken her; but the Court deny'd after Return of *Cepi Corpus*; *contra* if *Non est inventus* had been returned as to the Husband: But yet if it appear only a Practice, they will discharge her; to examine which, they gave Rule to the Sheriff to return the Body of the Husband. 1 *Keb.* 367. *Detbick and Taxley and Ux.*

Debt was brought against Baron and Feme for Debt supposed to be due from the Wife *dum sola fait*, and there was special Bail put in; and after Judgment against Baron and Feme, they render themselves to Prison in Discharge of their Bail; and it was moved for the Wife to discharge her, because there was not any Debt due from her before Marriage, but that this Action was contrived between her Husband and the Plaintiff to make the Wife a Prisoner. And it was agreed, That on mean Process, if the Wife be taken before the Husband, she shall be discharged; and when the Husband is taken, he shall give Appearance for both; but upon Execution, the Wife may be taken before her Husband, and shall be detained: But in this Case

On mean Process, if the Wife be taken before the Husband, she shall be discharged: Not so upon Execution.

Case the Wife, because of the Practice, was discharged. *Sid. p. 395. Gabree's Case. 2 Keb. 442, 576. Mesme Case.*

Baron to put
in Bail for his
Wife.

If Baron and Feme be arrested in an Action which requires special Bail, and the Husband puts in Bail for himself, he must put in Bail for his Wife also; but if he lies in Prison, the Wife cannot be let out upon common Bail; *aliter*, if the Husband abscond himself, and cannot be arrested. *1 Vent. 49.*

Regula.

Note; For a Rule, unless the Wife be arrested, or the Husband give Bond for her Appearance, he shall not be forc'd to put in Bail for both, if he will lie in Prison; but else he shall before he can be bailed in Debt upon a Statute enter'd by the Wife *dum sola*, against Baron and Feme; and the Court agreed; so the Husband must put in Bail for both, though she was never arrested. And so it is said, the Husband in Execution on an Action brought against him and his Wife, is not bound to appear for her, unless she be arrested; but he shall not be discharg'd, unless he put in Bail for himself and her. *1 Keb. 213, 225, 277. Craymer versus Andrews.*

Escape.

The Escape of the Husband is the Escape of the Wife, and in *Ca. Sa.* against Baron and Feme, the Gaoler suffer'd the Husband to escape; the Court said they would discharge the Wife, unless the Plaintiff would get the Husband taken again. *1 Vent. 51. Jackson and Gabree.*

Privilege for
the Wife of an
Attorney.

If Action be brought against Attorney of King's Bench, and his Wife, and he declares against the Husband being an Attorney of the Court in proper Person, and against the Wife *in Custodia Mar'*, upon Bail filed for the Wife only; this is not good, because the Husband ought to put in Bail for his Wife, and Bail may

not

not be filed only for the Wife, without Bail for the Husband ; and the Husband may not have his Privilege in this Case, when the Action is brought against him and his Wife. 1 Roll. Abr. 580. *Morthwait and Elsey. Per Curiam* : He ought to put in Bail, Style 226. *Mesme Case* ; and M. 17 Car. 1. Sir Simon Fanshaw's Case.

It is the Custom of B. R. where Process of Outlawry issues against Baron and Feme, and the Baron appears, he shall have Day by Bail, until the Appearance of his Wife ; but it is in the Discretion of the Court, when he comes in upon the *Exigent*, whether he should be let to Bail ; and this Court used not to let the Husband to Bail, but to continue him in Prison for the Contempt of his Wife until the Feme comes in ; and therefore the Bail was refused. Cro. Eliz. 370. *Philpot's Case*.

In Process of Outlawry Bail refused for the Contempt of the Wife.

For Debt due by the Wife before Marriage, the Husband was return'd outlaw'd, and the Wife wav'd ; but before the Return of the *Exigent*, one E. an Attorney, procured for the Wife a *Supersedeas*, surmising that the Wife had appear'd by him as her Attorney. *Per Curiam* : If upon the *Exigent* the Sheriff had returned *Reddidit se*, or upon *Pluries Capias* had returned *Cep. Corpus* for the Wife, then her Appearance should be enter'd, but not by Attorney, as it is here ; and the *Exigent* should only issue against the Husband ; and *idem dies* should be given to the Wife : But if upon a *Pluries Cap.* the Sheriff return for the Husband *Cepi Corpus*, and a *Non est inventa* for the Wife ; yet an *Exigent* shall issue against both, because it is intendable that the Husband may bring in his Wife ; but if upon *Exigent* the Sheriff returns *Reddidit se* for the Husband, and for the Wife, and she is waved, the Husband shall go *sine die* :

Upon the Sheriff's Return in Outlawry.

But

But in this Case, because the Exigent was return'd against both to be outlaw'd, the *Superfedeas* supposing the Appearance of the Wife, is idle and void; and therefore it was disallow'd; and the Exigent appointed to be filed against both. *Cro. Car.* 58. *Smith versus As* and his Wife.

They are at Exigent, no Superfedeas shall be received for the Baron without the Wife.

Process continues against Baron and Feme till the Exigent, upon which the Husband appeared, and put in a *Superfedeas* for himself only, without making mention of his Wife: The *Prothonotaries* said, By the *Superfedeas* the Husband is *sine die*; for he shall not be driven to answer without his Wife as this Case is; and he is impleaded as in the Right of the Wife, and therefore the Wife shall be waved, and the Baron discharged. *Lib. Int.* 187. But the Court gave Order that the *Superfedeas* should be stay'd, without recording the Appearance of the Husband; as so was it in the Case of *Lady Mallory* and her Husband, who were sued in an Action of Debt, and Process continu'd against them till the Exigent; upon which the Husband appear'd, and put in a *Superfedeas* for himself, without speaking of the Wife; and his *Superfedeas* was not allow'd, but Process continued until Outlawry. *1 Leon.* 138, 139. *Bilford* and *Fox*.

In Chancery.

If a Man be serv'd with a *Subpœna* in London against him and his Wife, she being in the Country; yet if he satisfy not the Court, as well for her as for himself, he being here in Person, an Attachment shall be awarded against him and his Wife, as though he had never appear'd.

Feme Covert pleads Misnosmer after Bail put in.

If a Feme Covert be arrested by a wrong Name, and gives a Bail-bond to the Sheriff by that Name, she may, notwithstanding, plead the *Misnosmer*. *Salk. Rep.* 7.

A Feme Covert who had apart from her Husband confess'd a Judgment, the Court of B. R. refus'd to set it aside on Motion; but put her to a Writ of Error. *Salk. 400.*

Judgment confess'd by a Feme Covert, refused to be set aside on Motion.

Outlawry.

If the Record be that the Wife is outlaw'd, this is erroneous, for it ought to be waved. *2 Roll. Abr. 804. Hayman and his Wife.*

Wife, in what Case may make an Attorney.

Pasch. 42 Eliz. B. R. contra: Process in Debt against Baron and Feme continues until the Exigent; the Baron appears, but will not suffer his Wife to appear: And it was ruled *per Cur'*, That in this Case she may make an Attorney, to prevent that she be not waved. *Dyer 271. b. Margin.*

In 3 *Bulst. 212.* Exceptions were moved to avoid an Outlawry in Baron and Feme: 1. Because the Wife cannot be said outlaw'd, but waved. 2. It was *comparuit* for *comparuerit*.

Exception to avoid an Outlawry in Baron and Feme.

Per Curiam: In the same Term, such an Outlawry may be avoided upon Exceptions by a Motion in Court; but this being in another Term, the same could not be avoided but by a Writ of Error: And the Court bailed him upon the Writ of Error; but they said he ought to appear in Person next Term, and so assign his Errors to reverse the Outlawry.

Debt was brought against Baron and Feme for Debt *dum sola*, and upon this the Husband was outlaw'd, and the Wife waved; the Wife was taken and imprisoned, but the Husband could not be found, and the Wife was discharged upon the Act of Indemnity, which pardons Outlawries, without suing a *Scire fac'* against the Plaintiff; and it was said she might not have a *Supersedeas*: But *Hutt. Rep. 86.*

1 Co.

1 Co. 44. b. 3 Cro. 370. 1 Cro. 58. She may in this Case have a *Supersedeas* upon the Exigent. Sid. p. 20, 21. *Biron and Beckley*.

In Trespass against Baron and Feme, if the Baron comes in by the Exigent, and the Wife comes not in; and for that it appears to the Court that the Exigent was discontinu'd against the Wife, they award a new Exigent against her; yet the Baron shall be put to answer presently, and shall not tarry till the Wife comes in, although he ought to answer again with the Wife when she comes in; when he hath pleaded, he shall have *idem dies* with the Wife. 39 Ed. 3. 18.

In Trespass against Baron and Feme, if the Baron make Default, and the Wife appears, the Wife shall not be put to answer till the Baron comes in, or be outlaw'd. 22 Aff. 46.

*She may not
plead to Out-
lawry without
her Husband.*

The Wife may not plead to Outlawry without her Baron, nor plead Pardon of Outlawry without her Husband. 2 Roll. Rep. 90. Sir Geo. Curson's Case.

Suits against Husband and Wife in Chancery.

A Bill was exhibited against the Husband and Wife, concerning the Wife's Inheritance; the Husband stood out all the Processes of Contempt; and it being moved that the Bill might be taken *pro confesso*, it was opposed, because that the Wife had in the Interim obtained an Order to answer; in which she set forth a Title to herself; and the Court decreed, that the Bill should be taken *pro confesso* against the Husband only, and that he should account for all the Profits of the Land received since the Coverture, and the Profits which shall be received

ceived during the Coverture. *Hill. i Jac. 2. between Ward and Meath, 2 Chan. Ca. 173.*

A Bill was brought by the Plaintiff against the Husband and Wife, Daughter of the Plaintiff; the Husband put in a Plea in the Name of him and his Wife, and swears to the Plea; but the Wife would not be sworn; and the Husband moved that the Plea might be accepted, suggesting that the Wife did it by Combination with her Mother; and it was order'd that the Plea do stand for the Husband, and the Plaintiff to proceed against the Wife. *1 Chan. Ca. 296.*

If a Bill be brought against Baron and Feme for a Demand out of the separate Estate of the Feme, and the Husband is beyond Sea, and not amenable by the Process of the Court; yet if the Wife is served with a *Subpœna*, she must appear, and answer the Plaintiff's Bill. *Between Dubois and Hole, 2 Vern. 613.*

Upon a Marriage-Treaty, the Husband agreed that the Wife should have her own Fortune to her own Use, to dispose of it as she thought proper; he afterwards running in Debt was arrested by his Creditors; and his Wife, in Consideration of their Discharging the Action, gave her Note for the Payment of the Money; the Creditors exhibited a Bill against the Husband and Wife, and took out *Subpœna's* against both, and actually served the Wife, but not the Husband, he being at *Rotterdam*; but neither the Husband nor Wife appearing, an Attachment was taken out against both; and the Husband still keeping out of the Way, the Wife was taken up, and moved to, be discharged. My Lord Keeper and the Master of the Rolls held, that, in this
D d Case,

Case, the Process was regular enough; and that the Husband was joined in the Suit only for Conformity. *Mich. 1711. between Bell and Commissary Hyde.*

If the Wife's Answer differs from the Husband's, it shall not prejudice the Husband; as if she confesses a Trust, which he denies. *1 Chan. Ca.* For she can be no Witness against her Husband. *2 Vern. 79.*

C H A P. XXIX.

Declarations and Pleadings.

The manner of declaring against Baron and Feme, or by Baron and Feme. In what Cases the Life of the Wife must be averred, or not. Where the Husband shall be estopped to say that his Wife is remitted, and yet she shall be received. In what Cases the Wife shall come in, and be received in Default of her Husband. Of the Wife's Pleading without her Husband. The manner of pleading Coverture. Of the Conclusion of Pleas in Actions by or against Baron and Feme. Where it is necessary to aver the Assent of the Husband. Traverse when that the Wife died seised. Adtunc & modo Uxor, if good. Of Estoppels. Error assigned because she was a Feme Covert. Divorce pleaded. Outlawry pleaded. Where there be two Women of a Name in Debt on Bond, how to plead. Where the Parol shall demur for the Nonage of the Husband and Wife.

IN *Assumpsit* the Plaintiff declares, where T. S. and M. his Wife were seised to them, and the Heirs of T. of five Acres of Meadow lying near a River called W----River; and being so seised, by Indenture let the same to the Plaintiff for 21 Years, by Force whereof he was possessed; the Defendant such a Day erected a Water-mill *super & trans* the said River; by Reason *Tort.* whereof *obstupavit* the Water, so that the Water overflowed the Banks, and *inundavit* the said five Acres of Meadow, by which they became barren, and *scirposæ ad damnum, &c.*

Remitter.

their two Lives, saving the Reversion to the Lessor and his Heirs: In this Case the Wife is in her Remitter, and she is seised in Fee as before, and the Lessor hath nothing in the Reversion. But in this Case if the Lessor will sue an Action of Waste against the Husband and his Wife, for that the Husband hath committed Waste, the Husband cannot bar the Lessor by shewing this; that the taking back the Estate to him and his Wife, was a Remitter to the Wife, because the Husband is estopped to say that which is against his own Feoffment. But if the Husband make Default to the grand Distress, and the Wife pray to be received, she may well shew the whole Matter, and how she is in her Remitter, and she shall bar the Lessor of his Action; for in every Case where the Wife is received for Default of her Husband, she shall plead, and have the same Advantage in Pleading as if she were a Feme Sole, &c.

If Judgment be to be given for two Defaults, and after it is adjourned till another Term, the Wife shall not be received this Term before Judgment, for that she does not come in, *propter non petenti respondere*, in due time. 9 H. 6. 17. In Action of Waste against Baron and Feme, after the Waste found before the Sheriff, and returned in Banco, the Wife shall not be received, to avoid contrary Verdicts. 2 H. 4. 6.

In Assise against Baron and Feme, if they plead Recovery in Bar, and at the Day fail of the Record, by which Judgment is to be given by the Statute as Disseisors, yet the Wife may be received. 7 H. 4. 16. b. 10. H. 4. 9. b.

In Action of Waste against Baron and Feme, and no Waste pleaded, the Wife shall be received after Inquest taken, and before Judgment. 22 Ass. 11. 28. Ed. 3. 91.

If

If in a Writ of Error to reverse a common Recovery brought against Baron and Feme, and the Baron and Feme are returned Terretenants *Octab. Trin.* and then they appear, and the Plaintiff assigns Errors, and after the Husband does not put in any Plea but makes Default, on which the Plaintiff prays the Errors may be examined: But after in *Hill. Term* the Wife comes in, and saith this is her Land, and prays to be received. It was doubted in the Earl of Oxford and *Muschamp's Case*, whether she shall be received, inasmuch as she comes before Judgment. *11 Car. 1. B. R.*

In *Formedon* the Tenant pleads Non-tenure, and found for the Demandant; and now the Wife of the Defendant after Verdict prayed to be received upon the feint Plea of her Husband, because he had pleaded Non-tenure, where she might have traversed the Gift; and he brought a Writ out of Chancery *de Attornat' faciend'* for the Wife. And *per Curiam*: It was received; for false Pleading is feint Pleading; and here there needs not any new Declaration, because the Wife is Party to the Suit; *aliter* where he in Reversion is not Party to the Suit, and is received. *Cro. El. p. 826. Greswold and Holmes.*

*Where there
needs a new
Declaration or,
not.*

Of the Wife's Pleading by her self.

In Battery the Husband justifies; for that the Plaintiff assaulted his Wife, in Aid of whom, &c. The Wife for her self pleads, and justifies *de son assault demesne*. The Plaintiff saith, *de injuria sua propria absque tali causa*: Both Issues are found for the Plaintiff, and the Damages are entirely assess'd: All is ill; and a Repleader was awarded. *Cro. Jac. 329. Thorp and Watson.*

Assumpsit was brought on the Promise of the Wife *dum sola*. The Plea was entered in this Manner; *Et prad' J. N. & Bridgetta ven' & def. &c. & prad' Bridgetta dicit quod ipsa non assumpsit: Verdict pro Quer'. Per Curiam: It is ill, for the Wife cannot plead by her self, (except in Receipt) and the Trial is idle, and not helped by any of the Statutes of Jeofails; and a Repleader was awarded. Cro. Jac. 288. Tumpion and Newson: It ought to have been quod prad' J. & Bridgetta dicunt quod ipsa Bridgetta non assumpsit. Telu. 210. Mesme Case; so Cholmly and Apsley's Case cited there: Action was brought against Baron and Feme for Words spoken by the Wife, and the Wife only pleads Not guilty, and Verdict pro Quer'; but could not have Judgment; but a Repleader was awarded.*

Of Pleading Coverture.

Debt on Bond against Feme. Defendant pleads that at the Time of the making the Bond she was Wife to J. J. who as yet is *plena vita existit; Et sic non est factum*. The Plaintiff shews how that after this Bond made, there was a Suit in the Spiritual Court concerning the Marriage between the said J. J. and the Defendant, and for that he had another Wife alive at the Time of the Espousals with the Defendant; the Defendant's Marriage was by Sentence adjudged void and null; and shews the Life of the first Wife at the Time of the second Marriage with the Defendant, and demurred upon it; judged *pro Quer'*: For this Divorce is but declaratory, because the Marriage was meerly void, and there needed not any such Sentence of Divorce; for it was void *ab initio*, and

and she was always Sole. Cro. El. 857. *Ridlesford and Wogan.*

Eliz. W. brought Trespass by the Name of a Widow. The Defendant pleads she was Covert Baron, (viz.) of one *J. W.* who is in full Life at Lisbon in Portugal; and this Plea was disallowed for the Impossibility of the Trial. *Moore 851. Eliz. Wilmer's Case.*

After Imparance as a Feme Sole in Trespass and Assault, the Defendant pleads that at the Time of the Bill exhibited, she was Covert, and concludes in Bar. *Per Curiam*: This is but as a Plea in Abatement, and therefore granted a *Respondeas ulterius*. 1 *Keb.* 822. *Beck and Carrister.*

On Obligation Infancy must be pleaded, and the Party cannot be aided on *Non est factum*; Regula but a Feme Covert may. 3 *Keb.* 228. For it is a Rule in every Case where the Obligation is void, he shall conclude *Non est factum*, for it is void as to her; otherwise where the Bond or Deed is only voidable, for there he shall shew the special Matter, and conclude Judgment *si actio*: For when the Deed is voidable, and so remains at the Time of the Pleading, (as in Case of sealing a Bond by the Infant, or Dunces) here he cannot plead *Non est factum*; but it must be avoided by special Pleading, and conclude Judgment *si actio*. 5 *Co.* 119. *Whelpdale's Case.*

Debt by *H.* against *J.* and his Wife. The Defendant pleads that *tempore Confectionis*, and shews the Day that she was a Covert Baron. The Plaintiff confesseth it, but saith that the same Day she sealed it was the Day of the Marriage in the Morning before the Espousals. The Defendant demurs, and the Plaintiff had Judgment. 2 *Ball. Rep.* 431. *Jackson's Case.*

Debt

Debt on Bond. The Condition was, That S. the Defendant with his Wife should appear at the Marshal's Court, and for Non-appearance the Action is brought. S. appears and pleads, that at the Time of the Obligation he was *solutus & innuptus*. The Plaintiff demurs. *Per Rolfe*. This Plea is not the same with *ne unques ac couple*; for one extended to a Feme *de facto*, the other to a Feme *de jure*; but Judgment *pro Quer*. *Style Rep. p. 17. Paine and Skelton*.

Conclusion of Pleas.

Vide supra. Non est factum.

Battery against Baron and Feme. They plead *Quoad the wounding non culp.* and *quoad the Battery*, the Feme pleads in Justification, and concludes with an Averment, *Et hoc parati sunt verificare*. The Question was if it ought not to be *Et hoc parati sunt verificare?* and by the Opinion of some the Husband ought to have joined with the Wife. *Cro. Car. 594. Pelham and Hemings*. *Et hoc parati sunt verificare?*

Et hoc parati sunt verificare.

Trover against Baron and Feme, and that the Wife after Coverture found the Goods, and converted them to her own Use. They plead *quod ipsi non sunt culpabiles*; and it was held ill, for that no Tort is supposed in the Husband, and they ought to have pleaded *quod ipsa non est culpabilis*. *Cro. Jac. 56. Cox and Cropwell*.

Quod ipsi non sunt culpabiles.

Action of Assault, Battery and Wounding against L. and his Wife. The Defendants plead *non culp.* as to the Wounding. The Feme pleads a special Plea in Justification, that what she did was in the Defence of her Husband. The Plaintiff replies, *De injuria sua propria*, and does not traverse *absque tali causa*, and the Jury finds entire Damages. *Per Curiam*: The Issue joined is

De injuria sua propria.

an

in immaterial Issue, and there can be no Judgment; and a Repleader was awarded. *Style, p. 98, 210. Jennings and Lee.*

Trespass against *B. and Ux. simul cum Bennet*, of an Assault. The Defendants plead his Assault on them. The Plaintiff sheweth forth a Writ taken out against the Husband: To which the Defendant demurred; 1. Because the Writ is not said taken forth against the Defendant, *simul cum Bennet*; *sed non alloc.* 2. The Replication is only of the Arrest of the Husband: *Sed non alloc.*; the Wife coming in after the Assault begun and need not be *de injuria sua propria* as to the Wife. 3. *Keb. 763. Putler's Case.*

Debt on Bond conditioned for the Performance of Covenants in an Indenture between *W. S.* and *A.* his Wife of the one Part; and the Plaintiff of the other Part. The Defendant pleads the Indenture as the Indenture of *W. S.* and *A.* his Wife, whereas in Truth the Feme never sealed. The Plaintiff replies, The Indenture shewed by the Defendant *non fuit fact' inter W. S. and A. his Wife on the one Part, and the Plaintiff on the other*: The Jury find the Husband sealed it, but the Wife did not. *Per Curiam*: The Verdict is found against the Defendant, who pleaded it as the Deed of the Wife: And it was held, that the Plaintiff is not estopped to say that the Deed shewn is not the Deed of the Baron and Feme; but he is estopped by the Condition to say, that there is not any such Indenture. Two of the Judges held, that if the Baron had sealed and delivered it in the Name of the Feme, it had been the Deed of the Feme during the Life of the Baron. *Cro. Eliz. 769. Sleep and Stead.*

Where it is necessary to aver the Assent of the Baron or not.

If an Estate be made to a Man's Wife *de morte*, it is not necessary to aver his Assent, for it well 'till he dissent. *Hob. 204.* But if the Feme Convert hath a Lease for Life and surrender it, and take a new one, the Husband's Assent is necessary, because the Wife had an Estate before, which cannot be divested but by his Assent to the later Estate.

Traverse.

In Trespass the Defendant pleads in Bar, that such an one was seised of the Land in the Right of his Wife, and that his Wife died seised, and that he was Heir to her, and gave Colour to the Plaintiff. The Plaintiff reply'd, That the Baron and Feme were jointly seised, and that the Wife died, after whose Death the Husband was seised by Survivorship; *absque hoc*, that the Wife died seised. *Per Curiam* This Traverse is not good that the Wife died not seised, but it ought to be that she died not sole seised. *Warr. p. 7.*

Adtunc & modo Uxor.

In Replevin the Defendant makes Avowry in the Right of Mary, *adtunc & modo Uxor ejus*, of the taking of Cattle as a Distress. The Avowment of *modo* the Wife is certain enough. *2 Keb. 726. Pea versus Longville.*

Modo & forma.

In Trespass the Defendant justified by Licence to the Defendant for himself and his Wife, to inhabit there. The Plaintiff replies, *Non licuit* the Husband and Wife *modo & forma*, and it is found *non dedit Licentiam modo & forma*. This is a Variance. *3 Keb. 759. Tappin and Jackson.*

A Debt was brought by B. and his Wife against the Defendant for Arrears of Rent upon a Lease for Years made by the Feme and her first Husband, to the Defendant by Indenture. The Defendant pleads that the Ancestor of the first Husband was seised in Fee, and that it descended

ed to the first Husband, and that he was Sole
 Seised, and so the Feme had nothing at the
 Time of the Lease made. The Plaintiff demurs,
 and shews for Cause, that the Lease being by
 Indenture, the Feme hath the Reversion by
 Estoppel against the Lessee, and the Defendant **Estoppel.**
 cannot contradict it, and say she hath nothing.

1. *H. 4. 1.* But *per Curiam*: The Plea is good.

1. For in this Case it is no Estoppel, for the
 Deed is utterly void as to the Feme, she being
 Covert, and it cannot be an Estoppel, for an
 Estoppel ought to be mutual on both Parts, and
 the Deed of a Feme Covert cannot estop her,
 or bind her to any Effect. *Cro. Eliz. p. 700.*

Brereton versus Evans.

If Land descend to a Feme Covert, Entry
 shall be pleaded by the Baron and Feme: In
 Descent to Daughters, he shall say, *Post cujus*
mortem reversio Tenementorum prad' cum pertin'
descend' prasat' A. & B. ut filiabus & coheredi-
bus prad' W. You shall never say, *Et se tenuit*
imus, but where they are in of a joint Estate;
 for if a Feme Tenant for Life take Husband,
 and the Husband dies, you shall say, *Obiit, post*
cujus mortem prad' le Feme fuit seifita de Tene-
mentis prad' in dom' suo ut de libero Tenemento.

Ex Manu-
 script. Mri.
 Brownl.

If Land descend to two Women Covert, and
 they enter, and the Husband of one dies, you
 shall say, *Le Feme survive & fuit seifita de me-*
dietae Tenementorum in feodo.

Note; when Land is given to Baron and Feme
 in Tail special, and the Baron dieth, the Wife
 if she will maintain the Estate-Tail, must alledge
 that the Baron and she had Issue in *pleine vie* A.
 otherwise she is but as Tenant in Tail after Pos-
 sibility of Issue extinct, which is but as Tenant
 for Life.

Annuity

*Nil detinet
to Action for
Arrears of
Rent.*

*Marriage a-
verred.*

*Error may be
assigned that
she was a
Feme Covert
at the Time of
the Appear-
ance, tho' she
appeared and
pleaded as a
Feme Sole.*

Annuity is devised by Will to a Feme Covert for Life, who dies, the Husband brings Action of Debt upon the Statute of 32 H. 8. for the Arrears against the Administrator of the Tenetenant. To which the Defendant pleads *Nil detinet*; if a good Plea or not, *Hard. 332, 333.* because the Action is grounded upon a Will in Writing, which (as was urged) was equivalent to a Deed, and to a Deed it were not a good Plea. As in Case of Debt upon Bond or Specialty; but by *Hale*: A Will is not a Deed, and *Nil detinet* is a good Plea to Action of Debt grounded on a Will.

In Avowry as Bailiff to Baron and Feme for Rent Arrear. The Plaintiff demurred specially, because the Marriage is not averred; *sed non al-loc'*; but by *Hale*: The Life of the Wife is not averred, which is ill on special Demurrer, but on Verdict or general Demurrer it would be well enough. 3 *Keb. 151. Harlow and Bradnock.*

If Action on the Case be brought against A. S. a Feme Covert as a Feme Sole, and she appears, and pleads to it as a Feme Sole, and Judgment given against her, upon which she and J. S. her Husband, brought a Writ of Error; they may assign for Error that she was a Feme Covert at the Time of the Appearance and Pleadings, &c. for otherwise the Wife may be taken *ad Executionem*, without the Con- sance of the Husband, and so be bereaved of the Society of the Woman, and he hath no other Means to defeat it. 1 *Roll. Abr. 759. Edwards and Simpson.*

B. and Anne his Wife were Plaintiffs in *Assumpsit* against *Hudson*; and declare in Con- sideration that *Anne dum sola fuit* would marry one *Tho. M.* at the Request of the Defendant, the Defendant promised after the Death of *Tho.*

Tho. M. to pay to the said *Anne* 40 s. per *Annum* during her Life; and shews that upon this she married *Tho. Mason*, who after dies, and she took to Husband *B.* the Plaintiff, and that 4 l. is in Arrear for two Years after *Tho. Mason's* Death. The Defendant pleads in Bar a Release made to him by the said *Tho. Mason* during the Marriage of *Anne*. The Plaintiff demurs, and adjudged for the Plaintiff. This Release doth not discharge the Promise, because though the Promise was present, yet the Execution of it was *in futuro*, and such that he which releaseth it can never have an Action for it; *aliter* if he by express Words released all Promises, or all Actions and Quarrels which he or his Wife had or might have; for a Promise being a special Cause of Action, may not be released until it comes *in Esse*, no more than a Covenant. *Yelv. 156. Belcher and Hudson.* *Cro. Jac. 222. Hob. Smith and Safford's Case.*

Release pleaded in Assumpsit.

Promise cannot be released till it comes in Esse, unless by express Words.

Debt against Baron and Feme as Executrix to her former Husband, upon a Bond of 200 l. The Defendants, by J. G. their Attorney, plead, (*viz.*) *Præd' Joh'* and *Margareta* by their Attorney plead that they were divorced before the Writ purchased. The Plaintiff demurs. 1. Because it is not alledged that the Divorce did continue, for it may be it was repealed; *sed non alloc'*, for it shall be intended to continue if the contrary be not shewed. 3. Because they plead as Baron and Feme, *Et præd' Joh' & Margareta*, and that after Imparlance; *sed non alloc'*; for they do not plead, *Et præd' Johannes & Margareta Ux' ejus*, for then it should be an Estoppel. *Cro. Eliz. 352. Underhill vers. Johannem Brett and Margaret his Wife.*

Divorce pleaded.

Where the Baron may plead as a Devise to him sole.

An Estate is devised to a Man and his Wife, and their Heirs: If the Husband survives, he may plead it as a Devise to him sole. *Co. Eliz.* 359.

Outlawry pleaded.

Outlawry in the Husband cannot be pleaded where he and his Wife sue as Administrators. *Hardr. p. 60.*

Traverse.

Debt on Bond entered in to *Elizabeth Perkins*, who was the Plaintiff's Wife, and as her Administrator brought the Action. The Defendant pleads he delivered the Bond to one *Elizabeth Perkins's* Sister, *quæ obiit sola & inaptat absque hoc*, that he delivered it to *Elizabeth Perkins* the Plaintiff's Wife. Special Demurres. If it be taken that there be two of the Name, the Defendant should have pleaded *Non est factum*, for it amounts to no more; or at least he ought to have induced his Plea that there were two *Elizabeth Perkins*, but this Traverse is designed to bring the Marriage in Question, which is not to be tried now. Judgment *pro Quer.* 1 *Vent.* 77. *Gifford and Perkins.*

A. brought Action against *Juliana Goddard* a Feme Sole, where the Parties are at Issue, and a *Scire fac.* is awarded; and before the Return of it, she takes to Husband one *Doyly*; and after upon special Verdict found in the said Suit, Judgment was given *in Banco pro prad' Julianam* against the said A. Upon which Judgment, A. brought a Writ of Error in B. R. and a *Scire fac'* is awarded against *Juliana Goddard* a Feme Sole; and she appears by Attorney as a Feme Sole by Assent of the Husband, and after the Judgment is reversed, and the Judgment was entered *quod prad' A. recuperet, &c. versu prad' Julianam, &c.* and Costs and Damages taxed. On which Judgment A. sues a *Ca. Sa. vers. Julian. Goddard*; by Force of which the Sheriff

Sheriff takes *Julian*, who is called *Doyly*; yet this is lawful; for the Wife, so long as the Judgment is of Effect, is estopped to say that her Name is other than *Julian Goddard*; and the Sheriff being a Minister to execute the Judgment, may take Advantage of this Estoppel. *Estoppel*
1 Roll. Abr. 869, 870.

In Account against the Husband it is a good Plea to say, that his Wife was a common Taverner, and that the Plaintiff delivered the Tonnels of Wine (for which the Account is brought) to the Wife to sell for him, without the Assent and Accord of the Husband, and she sells them accordingly, and delivers the Money to the Plaintiff. *13 R. 2. Accompt 50.*

In Action brought by Baron and Feme for the Inheritance of the Wife; the Parol shall not demur for the Nonage of the Husband, because *in jure Uxoris*, *Dyer 137.* *Parol demurs for the Nonage of the Wife, or not.*

But in Action of Debt brought against Baron and Feme upon Obligation of the Ancestor of the Feme, the Parol shall demur for the Nonage of the Wife. *8 Ed. 2. Age 125.*

In a *Præcipe quod reddat* against Baron and Feme of Land which the Wife had by Descent, the Parol shall demur for the Nonage of the Wife, although the Husband be of full Age. *18 Ed. 3. 33.*

If a Feme in by Descent be received for Default of her Husband, the Parol shall demur for her Nonage, though the Husband be of full Age. *18 Ed. 3. 33.*

C H A P. XXX.

Issue. Evidence. Trial. Verdict.

Trial of Marriage. Death of the Husband, where triable, and how; whether by Proofs or in Pais. If the Baron and Feme shall join in a Challenge. In what Case by the Evidence of the Wife she and her Husband were discharged of a Judgment. Where the Husband shall be a Witness for the Wife or not.

Trial of Marriage. Vide Title Marriage.

Death of the Husband, where triable, and how.

IF the Life of the Husband be pleaded, (in Dower) and the Demandant saith he is dead; this shall be tried by *Proofs*, and not *per Pais*. 8 H. 6. 23.

In Assise against Baron and Feme, if the Feme comes, and alledgeth the Death of the Husband in another County; if this be tried *per Pais*, it shall be tried where the Death is alledged.

In a Writ of Dower, if the Tenant saith that the Husband is in full Life at a Place beyond the Seas, (as at *Paris*) this shall be tried by *Proofs*. 26 Ed. 3. 70. For the Country cannot know it.

Trials by Proofs.

The manner of Trial by *Proofs* is more particular in *Thorn and Rolf's Case*, *Dyer* 185. a. In Dower the Issue was upon the Life or Death of the Husband, and Day given to each Party *ad docend' Curiam* (*viz.*) to the Demandant *de morte viri*, and to the Tenant *de vita* by *Proofs*, *ut oportet*; and the Demandant *protulit duos Tes-*

tes

ter de morte; whereof one was the Brother of the Husband, who was sworn and examined by *Lennard* second Prothonotary, and their Testimony tended to no full Proof, but by Conjectures and Presumptions, (*viz.*) that the Husband departed this Realm *Anno 1 Mar.* for Religion, and was a Minister, and for these seven Years he had been absent; and Religion now was restored, and he was not returned, and no Merchant of *Germany*, or *English*, who travelled those Parts, could learn any Thing of his Life, nor no Token of it; and therefore they conclude in their Consciences, that they rather think him dead than alive, and their Testimonies were entred *verbatim in Record. ante judicium redditum; & nullus Testis ex parte tenentis productus fuit de vita viri; ideo concessum fuit quod petens recuperet seisinam, &c. Vide Stat. Jac.*

In *Ejectione Firme* vers. Baron and Feme. Upon Not guilty pleaded, and a *Venire fac'* granted, the Jury find the Wife Not guilty, and found a special Verdict as to the Husband; which special Verdict is after adjudged insufficient by the Court: A *Venire fac' de novo* shall be granted for both, as well for Feme as for the Baron; and upon this new Writ the Wife may be found Guilty, because the Record and Issue is entire, and for this their Verdict insufficient in the whole and void. *M. 9 Jac. B. R. Langley and Paine*; and the Clerks said this was their Course to grant a *Venire de novo* for the whole.

Where a Battery is brought against Baron and Feme supposing they beat the Plaintiff, or the Mare of the Plaintiff: And upon Not guilty pleaded, it is found that the Woman only made the Battery, and not the Baron. This Verdict is against the Plaintiff, for it now appears that

Special Verdict for the Husband adjudged insufficient; a Venire fac' de novo shall be granted for both.

Verdict.

the Plaintiff's Action was false; for the Baron in this Case shall not be joined for Conformity only; and there is a special Writ in the Register for this Purpose, and it is not like a Battery charged upon J. D. and J. S. for there one may be acquitted, and another found guilty, and good; because they are in Law several Trespases. 1 *Brownl.* 209. *Drury and Dennis.*

The Wife may not join Issue without her Husband in Information against Baron and Feme, for the Recusancy of the Feme; and in 42 *Ed.* 3. she may not plead to Outlawry without her Husband. 2 *Roll. Rep.* 90.

Challenge.

Trespases by Baron and Feme. Defendant pleads Not guilty; and the Husband only made a Challenge that he was Servant to the Sheriff. *Per Curiam*: The Husband and Wife should join in the Challenge, although the Cause of Challenge proceeded from the Husband only. But after Trial it was aided by the Stat. of *Jeofails*, and Judgment *pro Quer'*. 1 *Brownl.* 234. *Wright's Case.*

Evidence.

Vide 1 *Inst.*
By the Evidence of the Wife, she and her Husband are discharged of a Judgment.

Parris pretended to help a Woman, who had little Portion, to a great Fortune; and the Day before the Marriage *P.* procures the Woman to come to a Tavern, where he said, for her Provision after Marriage, in case the Husband would not maintain her, she ought to seal certain Papers; which in Truth were Warrant of Attorney and Release of Errors; and he paid to her 100 *l.* before Witnesses, and went into the next Room, and took it back again. *P.* was informed against for a Cheat, for extending the Husband's Lands upon this Judgment: And the Wife gave this Matter in Evidence, and

and the Court set aside the Judgment, and principally upon the Evidence of the Wife.

Mrs. *Dormer* bought a Child of *Tucky*, and pretended it her own, and false Swearing about it, as vid. *Sid.* 377. and Information of Perjury was brought. Now the Husband of *Tucky* may be admitted to prove the Issue whether the Child were feigned, albeit not to prove or excuse his Wife's Subornation of the other Defendant *B.* the Midwife in this Deception.

2 *Keb.* 403. *The King* vers. *Buckworth*.

The first Husband was produced at the Trial to prove the first Marriage, but the Court totally refused his Testimony. *Per Curiam* : The Feme cannot be Evidence against the Baron, nor the Baron against the Feme in any Case except Treason, because it might occasion implacable Dissension, according to 1 *Inst.* 6. b. and denied the Lord *Audley's* Case to be Law. *Hutton*, p.

And where not.

A Wife cannot be produced as a Witness either for or against her Husband. 1 *Inst.* 6. b.

An Information was brought against *Charles Dudley*, Bastard Son of Sir *Robert Dudley*, for forging the Registry of a Marriage in a Parish-Book : And he was fined 200 Marks : It was resolved in that Case, That such Parish-Registers are good Evidence of Births and Marriages by our Law. 2 *Sid.* 71.

Parish Registers Evidence of Births and Marriages.

By 21 *Jac.* c. 19. The Wife of a Bankrupt may be examined against him upon Oath.

Wife of a Bankrupt, Witness against him.

C H A P. XXXI.

Judgment. Execution. Damages.

Where Judgment against Baron and Feme shall bind the Husband surviving, or not. In what Cases a Feme Covert shall be taken in Execution. Writ of Error brought by all for the Couverture of one. The Couverture of a Woman not to be determined by Affidavit. In Action against Baron and Feme, where Judgment shall be quod Capiantur, or not. Where Baron and Feme both ought to be in Misericordia, or not. Baron and Feme in Execution, and the Wife escapes, if Action lies against the Sheriff. Where the Husband shall recover Damages Sole. Judgment that the Baron and Feme shall recover Damages, in what Cases good.

Where Judgment against Baron and Feme shall bind the Husband surviving, or not, or the Wife.

Where there is a Devastavit returned against Baron and Feme, and the Feme dies, the Husband shall be charged.

DE B T was brought against Baron and Feme upon Obligation made by the Testator of the Wife, and Judgment, and *Fieri fac'*, and upon this a *Testat' Fieri fac'*; and upon this a *Devastavit* was returned, and Judgment was for the Plaintiff to recover; and then the Wife dies: Error was brought to reverse this Judgment; And upon several Debates it was adjudged that there was not any Error in *redditione judicii*, &c. But that the Baron is liable to this Execution notwithstanding the Death of the Wife. *Sid. 337. Eyres and Coward*; and so resolved in *Mounson and Bourne's Case*. If there be a Recovery against Baron and Feme in a *Devastavit*, if the Baron survive the Wife, he shall

shall be charged; and if the Wife survive, she shall be charged; so is *Jacobson and Charlton's Case*, 3 *Keb.* 205. In Debt against Baron and Feme Executrix, on Obligation of M. to the former Husband, and Verdict on *Devastavit*, after *Scire fac'*, and Error and Judgment affirmed, the Feme alone was taken in Execution. She shall not be discharg'd, here being a Verdict of the Waste. And *per Hale*, Had the Wasting appeared to be during the Coverture by her, yet she alone might be taken in Execution.

And if the Husband dies, the Wife shall be taken in Execution.

If Debt on Bond be brought against Baron and Feme, and Judgment, and then the Wife dies, yet the Husband shall be charged. *Sid.*

Debt.

337. If Baron and Feme obtain a Judgment in Debt in the Right of the Wife, and the Wife dies, yet the Husband shall have Execution upon this Judgment, *Sid.* 337. and not the Administrator of the Wife, because the Debt is alter'd by the Judgment.

In what Cases a Feme Covert shall be taken in Execution, and in what not.

In a *Devastavit*. *Vide supra*.

The Court discharg'd a Feme Covert taken in Execution on Judgment, on Demurrer to Coverture pleaded in Abatement after Imparlance. The Court awarded a *Supersedeas*, no Judgment being enter'd. *Affidavit* was made that she was Feme Covert before. 1 *Keb.* 143.

Supersedeas.

Judgment against the Lady *Prettyman* as Sole, and she was pretended to be marry'd before Judgment, and it was pray'd that she might be discharg'd of the Execution, and a new *Scire fac'*. *Per Curiam*: She might have pleaded

If Feme Covert be taken in Execution, she shall not be discharg'd but by Writ of Error.

this alone upon the *Scire fac*; but now being taken in Execution, they cannot ease her till Sentence in the Spiritual Court for the Marriage: But she might, with her Husband, bring a Writ of Error, and assign this for Error. In Trespass against *A. B.* and several others, *A.* being Covert, all brought a Writ of Error, and for it the whole Judgment was reversed. 3 *Keb.* 13. *Marshall* and the Lady *Prettyman*; and the Court will not suffer the Husband to release the Error.

Coverture or not, not to be determined on Affidavit.

In *Hunsty* and *Sanders's* Case, Counsel prayed that a Feme Covert, the Defendant, might be discharged on Affidavit that, at the Time of the Bond which she enter'd into as Feme Sole, she was Feme Covert; *Sed non allocatur*; this being for Rent of an House taken by her as Sole. And in the Lady *Prettyman's* Case, the Court did not determine it by Affidavit. 3 *Keb.* 382.

The Defendant Feme Covert prayed to be discharged of a *Cap' Excom'* returned in *B. R.* for Non-payment of Costs on Libel against her for Incontinence, being not within 5 *Eliz. cap. 23. sect. 12.* which the Court agreed, and the *Capias* discharged: Some conceived it was not avoidable but by Plea. 3 *Keb.* 836. *Dom. Rex* and *Coates*.

Judgment against Baron and Feme, where the Baron was acquitted, ought not to be against a Feme Covert by *Stat. W. 2. cap. 35. Cro. Jac.* 417. *Dr. Hussey* and *Moor*.

If the Feme die after a Verdict, no Judgment can be given against the Husband.

If Action be brought against Baron and Feme, and the Feme die, though it were after a Verdict, yet no Judgment can be given against the Baron. *Hob.* 129. It was the Case of *Cowley* and his Wife against *Poulton* and his Wife, for scandalous Words by one of the Women against the

the other Woman. And after a Verdict, the Court was inform'd that one of the Women was dead; whereupon Judgment was stayed.

Hob. 129.

If a Feme Covert be taken on Mesne Process before her Baron for a Debt *dum sola*, she may be discharged; but when the Baron is taken, he shall appear for both: But on Execution the Feme may be taken before the Baron, and shall be detained. *1 Sid. 395.*

Feme Covert may be taken in Execution before the Husband.

In Action versus Baron and Feme, where the Judgment shall be capiatur, or not.

In Debt upon Bond against Baron and Feme, for the Obligation of the Wife before Coverture: On *Non est factum* pleaded, it is found against them; both shall be imprison'd; for the Husband is guilty of the Fauxity in Denial of the Deed, which is the Cause of the Imprisonment, as well as the Wife. *1 Roll. Abr. 221. 15 Jac. B. R. Wood and Sutcliff; and Hill. 37 Eliz. in Camera Scaccarii, Say and Bardoise. 1 Roll. Abr. 221.*

But in Trespass against Baron and Feme, if the Wife be found guilty, and the Husband not guilty, the Husband shall not be imprison'd, *22 Ass. 87.* but that seems not to be Law; for in *Wood and Sutcliff's Case*, *15 Jac. B. R.* and *Trin. 4 Jac. B. R. White and Halsey's Case*, Action of Battery was brought against Baron and Feme, and the Baron found not guilty, and the Wife guilty, and the Judgment was given *quod capiantur*, as well the Baron as the Feme, for that the Baron is Party to the Action, and ought to pay the Fine of the Wife. *P. 11 Car. B. R. Mayow and Cooksbot, and Cro. Car. 405. 1 Roll. Abr. 221.* So it was in Ejectment against Baron

Baron and Feme, and the Defendants pleaded Not guilty; the Wife was found guilty, and the Baron not guilty; and the Judgment was *quod capiatur*, and good; for it is only for Fine to the King, and the Imprisonment is no longer than till the Fine is paid.

But in Trespass of Assault and Battery against Baron and Feme, for a Battery done by the Wife, the Defendant being found guilty. *Per Cur'*: A *Capiatur* shall be against the Husband only, although the Wrong is only done by the Wife. *Gro. Car. 513. Aways's Case.*

Where Baron and Feme must be both in misericordia.

Trover and Conversion against Baron and Feme, and the Baron being requested to deliver the Goods with his Wife, refused, and the Wife alone is in *misericordia*; it is erroneous, the Baron and Feme ought to have been in *misericordia*. Under the late Statute of *Car. 2. 3 Bulst. 151. Wood and his Wife against Dr. Sutcliff.*

Escape.

Dr. S. recover'd in Trover against Baron and Feme, had Judgment against them, and both taken in Execution, the Wife escap'd, Debt lies against the Sheriff. *2 Bulst. 320. Dr. Sutcliff and Sir Geo. Regnell.* For the Wife was in Execution, and a Wrong was done by the Sheriff, and the Imprisonment is several, and so the Escape is several. *1 Roll. Abr. 215.*

In misericordia.

In Trover and Conversion against Baron and Feme, for the Conversion of the Wife during the Coverture, if the Wife be found guilty, and the Baron not guilty; yet both shall be in *misericordia*, for the Amerciament is not for the Conversion, but for the Delay of Suit, and not rendering the first Day, of which the Baron is as well guilty as the Wife. *1 Roll. Abr. 315.*

Judg-

Judgment against Baron and Feme, where the Husband was acquitted, ought not to be given against a Feme Covert, by Stat. West. 2. cap. 15. in Raviſhment of Ward. Cro. Jac. 413. Huſſey and More,

Action on the Caſe againſt Baron and Feme for ſcandalous Words ſpoken by the Wife, and Judgment is given againſt them both; as well the Husband as the Wife ſhall be amerced. Hob. Serjeant and Nelſon.

Action of Caſe againſt W. and his Wife for Words ſpoken by the Wife. The Defendants plead, *Quod ipſi non ſunt inde culpabiles*. The Plaintiff ſhall have his Judgment; for the Plea of the Husband is void, and ſo good for the Wife. 1 Roſ. Rep. 216. Carpenter verſus Welſh and Saffene.

Coſts. Damages.

In Treſpaſs by Baron and Feme for imprifoning the Wife until a Fine paid; for all the Treſpaſs, except the Fine, they ſhall recover Damages in Common, 11 H. 4. 16. b. but for the Fine, the Husband ſhall recover Damages ſole, becauſe it was his Chattel.

In Affiſe by Baron and Feme, if it be found they were diſſeiſed, they ſhall recover Damages of the Iſſues in common, 11 H. 4. 16. b. but if it be found that certain Goods of the Husband were taken upon the Land, the Husband ſole ſhall have Judgment of the Damages for them. 11 H. 4. 17. adjudg'd.

**If Baron be poſſeſſed of a Term in the Right of the Wife, and Damages are recover'd againſt him, the Damages ſhall not affect the Term of the Wife after the Death of the Husband, in regard ſhe came in Paramount; *aliter*, if an Ex-
tent**

tent be upon it, or upon a Recognizance in the Life of the Husband. 9 H. 6. 52.

If Baron and Feme join in an Action, and a Verdict is given for the Plaintiffs, and the Jury assesses Damages *ultra misas & custagia per ipsam* (which is the Husband) *circa sectam suam exposta* to so much, and *pro misis & custagiis illis* to so much. And upon this Judgment is given, That the Husband and Wife shall recover the Costs and Damages; although it is found that the Husband only expended and disbursed the Money for the Costs of Suit, forasmuch as the Wife had nothing; yet the Judgment is good, that the Baron and Feme shall recover the Costs, for there may not be one Judgment for the Costs, and another for the Damages. 1 Roll. Abr. 516. *Confee and Berree*.

C H A P. XXXII.

Of Divorce.

The Nature of a Divorce. What are good Causes of Divorce. The several Kinds of Divorces. What Divorces declare the Marriage void ab initio. Of the Divorce causa præcontractus, causa frigiditytis, causa affinitatis, consanguinitatis, and several Causes of each for Illustration. Of a Divorce a Mensa & Thoro, and the Consequences thereof. What mean Acts done by the Husband shall stand good or not, notwithstanding the Divorce. Of Suits and Actions after the Divorce. Where and in what Cases, notwithstanding a Divorce, the Wife shall be endowed, or not. Pleadings and Trial. What Divorce shall bastardise the Issue, or not.

A Divorce is where the Espousals were lawful, according to the Maxim, *Ubi nullus habitus, ibi nulla potentia*. So if a Man marry a second Wife, the first living, there needs no Divorce, in regard it is void *ab initio* by Law: For you must know by our Common Law, the Espousals in the Church be so strong, they cannot be defeated without a Divorce, and without giving Notice in Convention; and if they die before such Convention, the Issue shall never be a Bastard, inasmuch as the Espousals were not void, but voidable; and in all Cases where the Espousals are voidable, it behoves that the Party be convened before Separation, or otherwise the Espousals continue lawful, and the Issue is legitimate. *Moor 171.*

What

What are good Causes of Divorce, and of the several Kinds of Divorce.

Formerly some Matters were Causes of Divorce, which are not so now: As

1 & 2 P. & Mary, cap. 8. A Divorce propter *Impedimentum publica honestatis & justitia.*

Causa Compaternitatis, or *Commaternitatis*, (Godfather or Godmother) which in the Act of 1 & 2 P. & M. c. 8. are called *cognatio Spiritualis, causa Professionis*. Observe, if a Deacon or secular Priest had taken Wife, the Marriage was not void, but voidable, *causa Professionis*; and if either Party had died before Divorce, the Issue had been legitimate, and should have inherited, for that Deacons and Priests within England were not Votaries, (*viz.*) had not vowed Chastity; but if a Monk or Nun had married before the Stat. 32 H. 8. cap. 38. and of 2 Ed. 6. cap. 21. the Marriage had been merely void.

Causa cognationis Legalis, (viz.) Adoption.

These are all taken away.

In our Books the Division is common of Divorces, $\left\{ \begin{array}{l} a Vinculo Matrimonii; \\ a Mensa & Thoro. \end{array} \right.$

Those Divorces which dissolve the *Vinculum Matrimonii*, are

Causa Pracontractus,

Causa Frigiditatis: Where the Party hath *perpetuam impotentiam*.

Causa Affinitatis, or *Consanguinitatis*.

Causa Savitia sive Metus.

These Divorces declare the Marriage void *ab initio*, and declare the Issue a Bastard.

Something I shall say of each of these, and the Consequences thereupon.

By the Divorce *Causa Præcontractus*, as I said, *Causa Præcontractus* there is a Nullity of the Marriage, and the Children are mere Bastards. 2 *Inst.* 93. By the Divorce *causa præcontractus*, the first Parties are compleat Baron and Feme. It was Sir Robert Paine's Case, *Sid.* 13. If a Man contract with a Woman to marry her, and after he marries another Woman, the first Woman sues in the Spiritual Court, and it is by Sentence adjudged that the Man and first Woman are Baron and Feme; by this Sentence the first Man and Woman are compleat Baron and Feme without any other Solemnity; *quod Twisden negavit*; and said the Marriage ought to be solemniz'd before they can be compleat Baron and Feme: And Noy in his Lent Reading, *Ann.* 1632, held, That if the Wife be divorced from her Husband *causa præcontractus*, made with another by *verba de præsentis*, that in this Case immediately by Sentence given in Court, the Marriage shall be consummate between the Woman and her first Husband, without any Rites *in facie Ecclesiæ*; *aliter*, upon Contract by *verba de futuro*. *Dyer* 105. *b.* in Margin.

By Divorce *Causa Præcontractus*, the first Baron and Feme are compleat Baron and Feme, without other Solemnity.

Two were precontracted, one after is espoused to a Stranger, and after sued in the Spiritual Court, and Sentence is there given that they shall marry according to the Precontract, and she marries; this is good without Divorce or Consent of the Husband, and their Issue is not a Bastard. *Moor* 169. *Bunting's Case*.

Causa

Causa frigiditatis: Where a Man hath *perpetuam impotentiam generationis*.

If the Parties divorced Cause Impotentia intermarry others, and have Issue, whether the Issue are Bastards.

It hath been a great Question, if the Parties divorced intermarry severally with others, and have Issue severally, whether the second Marriage is void, and whether their Issues are Bastards? My Lord Dyer cites one Bury's Case, fol. 179. a. Sentence against Bury, *Causa frigiditatis naturalis ad sectam Uxoris suæ*; and the Wife was married to Cary, by whom she had Issue, and she gave all her Inheritance to Cary her second Husband; and Bury was married to another Woman, by whom he had Issue: And in this Case the Opinion of the Doctors was, that then the Persons shall be compelled to cohabit together as Man and Wife. *Eo quod Sancta Ecclesia decepta fuit in priori judicio.* Harrison, in his Lent Reading, cites a Case to be adjudg'd Hill. 37 Eliz. Stafford and Money. Feme sues a Divorce for Frigidity, and after the Husband marries another Wife, by whom he had Issue, and adjudged that the second Marriage is void; and the Civilians gave the Rule, *Qui aptus est ad unam aptus est ad aliam, & quando potentia reducitur ad actum debet redire ad primas nuptias.* *Impotentia & frigiditas quoad hanc est causa sufficiens divorce apres l'exploration, & Trial pro tres ans & auters Ceremonies*, enjoined by Canons, and the second Marriage of both is good, notwithstanding that the Party impotent have Children. *Vide Moor 225. 2 Leon. 169, 170, 171, 172.*

In Berry's Case, the first Judgment was given upon a Libel, which was that he was *frigidus*, and the Sentence was accordingly; but no mention whether *maleficiatus*, or not, *quoad hanc* only, or *frigidus a natura*; but because that after he took a second Wife, and had Issue by her,

her, a great Question was, Whether he shall be intended *maleficiatus quoad hanc*, or not? For the Proofs of the first Sentence tend to prove a perpetual Frigidity; and upon a special Verdict all this appearing, the first Sentence was intended to be true.

Causa Affinitatis, Consanguinitatis. Vide supra, Tit. Bastard.

Causa Savitiæ five Metus.

If the Husband take from his Wife Apparel, *Causa Savitiæ* and other Necessaries, this is a good Ground to sue a Divorce *Causa Savitiæ*. 1 Sid. 118.

If one of them be in Dread of the other for poisoning, it is a good Ground for Separation by Sentence.

Divorce *a Mensa & Thoro*, or *Causa Adulterii*: This doth not dissolve the Marriage, for it is subsequent to the Marriage, as the others are precedent. And in Case of Divorce *Causa Adulterii*, the Coverture continues between them: If the Husband after such Divorce release an Obligation, or any other Duty due to the Wife before Coverture, it hath been held a good Release; which proves that the Marriage continues, and the Wife, after such Divorce, shall have Dower of her Husband's Lands; which proves that the Espousals continue. And therefore in *Littleton's Case*, Sect. 380. a Lease is made to the Husband and Wife, To have and to hold to them during the Coverture between them; in this Case they have an Estate for their two Lives, upon Condition (*viz.*) if one of them die, or that there be a Divorce between them, then it shall be lawful for the Lessor and his Heirs to enter. *Littleton* here

Causa Adulterii.

Yet the Espousals continue.

speakes of such Divorce as dissolves the Marriage *a Vinculo Matrimonii*; for though the Husband and Wife are divorced *Causa Adultæriæ*, yet the Freehold continueth, because the Coverture continueth.

How a Woman divorced a Mensa & Thoro shall sue.

If a Woman be divorced *a Mensa & Thoro*, she must sue by her next Friend, as was Lady Rosse's Case; *aliter*, if she is divorced *a Vinculo Matrimonii*: As if a Man marries a second Wife, the first living, the second Wife may sue by the Name when she was Sole, for that the second Marriage is void *ab initio*.

Children born after a Divorce are Bastards.

When a Woman is divorced *a Mensa & Thoro*, the Children begotten afterwards are Bastards, for it shall be intended the Husband had no Access to her, unless the Contrary be shewn: But if the Man and Woman part, and live separate without such Sentence, the Children are taken to be legitimate, unless the Contrary be proved, for Access shall be intended; however, if a special Verdict find the Man had no Access, the Child shall be deemed a Bastard. See the Case between the Parishes of St. George and St. Margaret's Westminster, Salk. Rep. 123.

Second Marriage, the first Husband living, void, and needs no Divorce.

Where a Woman marries a second Husband during the Life of the first, the last Marriage is void, without any Divorce: And a Jury shall try the Fact. The Spiritual Court cannot give Sentence to annul a Marriage after the Death of the Parties, for they proceed only *pro salute Animæ*. Salk. 121.

The Spiritual Court judges of the Causes of Divorce and Alimony.

The Courts of Common Law seldom interpose where the Woman sues for a Divorce, or separate Maintenance in the Ecclesiastical Courts, as may be observed by Hyatt's Case, who prayed a Prohibition at Common Law to the Consistory Court of London, for that he was sued there

there by his Wife, to be separated from him *propter favitiam*; and Sentence given that his Wife should live from him, and he should allow her Five Shillings and Six Pence Weekly, notwithstanding the Husband offered Reconciliation, and desired Cohabitation, and proffered Caution to use her fitly. The Court deny'd to grant a Prohibition, and said the Court of the Ordinary was the proper Court for Allowance of Alimony, and may take Order for Separation or Divorce, if she be cruelly used. 2 Cro. 364.

The Case of *Green* was something harder: *Green's Case* He prayed a Prohibition to the Ecclesiastical Court of *Salisbury*, for that his Wife having sued him there to be separated from him *propter favitiam*, and Sentence given for the Husband; yet he was forc'd to pay all the Costs for his Wife; and she afterwards appealed, and because the Husband would not answer the Appeal against himself, and pay for transmitting the Record, he was excommunicated, and now prayed a Prohibition: The Court conceived the Case to be very hard, that he should be forced to spend his Money against himself, yet it being alledged the Course was so in the Ecclesiastical Court they did not grant a Prohibition, but took Time to advise. *Gre. Car. 16.*

What mean Acts done by the Baron shall stand good or not, notwithstanding the Divorce.

Where Baron and Feme are divorced, where she is an Inheritrix, mean Acts executed shall not be reversed by the Divorce, as Receipt of Rent, Waste, Presentment to a Benefice, Gift of the Goods of the Wife; contrary of Inheritances, if the Husband had discontinued or charged the Land.

He may release an Obligation due to the Wife before Coverture, after a Divorce *a Mensa & Thoro*; so of a Legacy, as was the Case of *Stephens* and *Totty*. *F. T.* was divorced from the Husband *Causa Adulterii* in the Husband; the Wife sued *Stephens* in the Spiritual Court for a Legacy given to her by a Stranger, and he pleaded the Release made by the Husband after the Divorce. *Per Curiam*: This Divorce is not a *dissolutio a Vinculo Matrimonii*, so as that any of them may marry again, but it is a Separation only, and they be not compellable to cohabit; but if they will they may, without any marrying. And in Regard this Separation does not avoid the Marriage absolutely, but they still remain Man and Wife, the Release by the Husband was good to extinguish the Duty. And the Books which speak that the Feme shall have her Goods after Divorce, are to be intended of an absolute Divorce *ab initio*. *Cro. El.* 908.

Where the
Wife shall
have the Goods
again.

If a Feme *post annos nubile*s, (*viz.*) at 12 Years contract Matrimony with *A.* and after marry with *B.* and after that she have passed the Age of 16 Years, her Marriage with *B.* is dissolved, *Causa Præcontractus*; by this Divorce there is a Nullity of the Marriage *ab initio*; and if she had any Goods or Personal Estate, she ought to have the same again, for *cessante causa cessat Effectus*. But if he had given or sold them before without Collusion, then there had been no Remedy; but if it were by Collusion, there the Wife might have averred the Collusion, and she may have the Goods, whereof the Property may be known either by Detinue, or in Chancery; and the rest that lay in Money, and the like, she may sue for by the Spiritual Law, or in Chancery: And the Reason, *Dyer* 13. *a.* why she shall have her Goods again is, because the Cause

Cause and Consideration of the Gift of them in Marriage, is now defeated; for the Goods were given in Advancement of her Marriage.

If the Husband aliens the Land of the Wife, and after they are divorced *causa Pracontractu*, or any other Cause which dissolves a *Vinculo*; the Wife during the Life of the Baron may enter by the Stat. 32 H. 8. c. 28.

If Baron and Feme purchase jointly, and are disseised, the Baron releaseth, and after they are divorced, the Feme shall have a Moiety, albeit there were not Moieties before the Divorce; for the Divorce converted it into Moieties.

Of Suits after Divorce. Vide Actions.

If a Man be obliged to a Feme Sole, and after she marry him, and after she is divorced; she may have an Action afterwards which by the Marriage was suspended.

If Baron and Feme are divorced *Causa Adulterii*, and after the Feme sues without the Husband for a Defamation; although the Divorce dissolve not the Marriage, yet in Regard the Feme by the Course of the Civil Law may sue alone, in such a Case a Prohibition has been denied. *Feme sues a gain.*

Where and in what Cases, notwithstanding a Divorce, the Wife shall be endowed, or not.

If Baron and Feme are divorced a *Vincula Matrimonii*, Dower ceaseth, but not if it be only a *Mensa & Thoro*. 1 Inst. 32. a.

If a Marriage *de facto* be voidable by Divorce in Respect of Consanguinity, Affinity, Precontract, or the like, whereby the Marriage might have been dissolved, and the Parties freed a *Vin-*

tulo Matrimonii; yet if the Husband die before any Divorce, there now because it cannot be avoided, this Wife *de facto* shall be endowed, for this is *Legitimum Matrimonium quoad dotem*.
1 Inst. 33. a.

A Woman Copyholder for Life according to the Custom of the Manor, *durante viduitate*, takes J. S. to Husband, she being Niece to a former Wife of J. S. upon which J. S. is questioned for an incestuous Marriage, and does Penance, and is bound not to keep her Company; and after J. S. dies, this Marriage does not determine her Estate, for she was not divorced *a Vinculo Matrimonii*, though there was Cause for it. *Hob. Remington's Case*.

Pleading.

In Pleading of a Divorce the Judges *coram quo*, must be precisely pleaded. 2 Leon. p. 170, 171.

Trial.

Divorce shall be tried by the Bishop, and not *per Pais*. 7 H. 4. 23. 19 H. 6. 18.

What Divorce shall bastardise the Issue, or not.

It appears before that such Divorces, which dissolve *Vinculum Matrimonii*, shall bastardise the Issue, if they are executed during the Lives of the Parties, otherwise not; and the Issue may not be made a Bastard after their Death: For the Divorce in the Spiritual Court is *pro peccatis*, which cannot be after their Death; and they cannot disinherit an Issue there.

If A. takes B. to Wife within Age of Consent, and after at the Age of Consent they dissent,

sent, and marry elsewhere, and have Issue and die, it cannot be examined in the Spiritual Court after, whether they consented at the Age of Consent before their Dissent, because they cannot bastardise the Issue after their Death; *Englefield's Case*; and a Prohibition granted out of Chancery upon it.

And it's a general Rule, that after their Death the Spiritual Court cannot examine any Matter to bastardise the Issue. If two are divorced for *Consanguinity*, if they were ignorant of the Consanguinity, the Issue shall be Legitimate. 1 *Roll, Rep.* 212. But see the Case of *Pride, v. the Earls of Barb and Mountague*, where it was held, That the Rule that a Person shall not be bastardis'd after his Death is true only in the Case of Bastard Eigne and *Mulier puisne*. *Salk.* 120.

C H A P. XXXIII.

Offences against the Statutes concerning Women.

Action on the Statute of 5 Eliz. c. 9. against the Husband and Wife for the Wife's not appearing ad Testificandum, and the Declaration of Polygamy against Stat. 1 Jac. c. 11. Of stealing of Women, &c. Construction of the said Statute, and of the Stat. 39 Eliz. c. 8. Of Rape. Baron and Feme indicted of Perjury. Information against a Feme Covert for selling Fish. In all Statutes which provide for actual Wrong, Femes Coverts shall be intended within them.

Upon the Stat. 5 El. c. 9. for not appearing ad Testificandum.

H. Brought an Action *sur Stat.* 5 El. c. 9. against H. and his Wife for the Penalty of 10 l. given by the said Statute against him, who was served with Process *ad Testificandum*, &c. and doth not appear, not having any Impediment, &c. And shewed that Process was served upon the Defendant's Wife, and sufficient Charges, having Regard to her Degree and Distance of the Place, &c. tendered to her, and yet she did not appear. Verdict *pro Quer.* Moved in Arrest of Judgment. 1. Because the Plaintiff in setting forth he was damaged for the not Appearance of the Wife, and has not shewn how damnified. *Respond.* Tho' the Party be not at all damnified, yet the Penalty is forfeited. 2. A Feme Covert is not within the said Statute, for no Mention is made of a Feme Covert. *Respond.* Femes Covert are within the said Statute, otherwise it would be a grand Mischief, for she may be the only Witness. 3. The Declaration is,

is, that the Plaintiff tendered the Charges to the Wife, where he ought to have tendered the same to the Husband. *Respond'*. The Wife ought to appear, and therefore the Tender ought to be to her: And Judgment *pro Quer'*. 1 Leon. 123. *Havithlom and Harvey, Mesme Case. Cro. El. 130.*

Polygamy.

Per Stat. 1 Jac. c. 11. If any Person or Persons within his Majesty's Dominions of *England and Wales*, being married, do marry any Person or Persons, the former Wife being alive, that then every such Offence shall be Felony, and the Person or Persons so offending, shall suffer Death, as in Cases of Felony. But this Act shall not extend to Husband or Wife, being absent seven Years from the other beyond the Seas. Nor shall it extend to any Person divorced at the Time of such Marriage in the Spiritual Court, nor to Marriage within the Age of Consent.

As to a Woman being divorced, and then marrying again. It was one *Porter's Case*: *R.* was lawfully espoused to one *Porter*, and had sued a Divorce *propter Savitiam*, and it was *Separamus a Mensa & Thoro*, but no Word of *Divorciamus*. By the better Opinion she is within the *Præviso*, and that it was not Felony; but it appeared by the Canons that such Persons, as are divorced *a Mensa & Thoro*, may not marry again; and it was clearly agreed by the Civilians, that the second Marriage was unlawful, and that she might be in Danger of the Statute; but it was not adjudged there: But in my Lord *Rosse's Case* it was the Opinion, that they might marry again. *Cro. Car. 461. Porter's Case.*

One

One *Williams* was indicted at *Bristol* upon Stat. 1 Jac. 11. for having two Wives, and upon Not guilty, a special Verdict was found that the said *Williams* married one Wife, and afterwards divorced from her *Causa Adulterii*, and afterwards married the other; and if that were within the *Proviso* of that Stat. which provides for those who are divorced, was the Question. And it was resolved without Argument by *Bramstone* Chief Justice, and *Heath*, (*ceteris absentibus*) that it is within the *Proviso*, for the Statute speaks generally of Divorces, and it is a Penal Law: And *Heath* said that by the Law of Holy Church the Parties divorced *Causa Adulterii* might marry; and he cited *Porter's Case*, who was divorced *Causa Sævitie*, and said it was resolved that that was not within the *Proviso*, because only a Divorce a *Cohabitacione*, and a Temporal Separation till the Anger pass. But here it is a *Vinculo Matrimonii*; (in which last he was much mistaken.) *March Rep.* 101.

One was indicted of Felony upon the Stat. 1 Jac. c. 11. for having of two Wives; and the Evidence was, that he espoused one beyond the Seas, and another here; and the Court was of Opinion that he was not within the Statute. *Quære*, If the second Espousals were beyond the Seas, for that makes the Offence, and cannot here be tried. *Sid.* 171.

Counsel on 1 Jac. c. 11. prayed Stay of Process upon the Recognizance of the Prosecutor, who was bound over by Judge *Archer* Judge of Assize in *Cornwall*, to prosecute the Defendant for having two Wives; in Regard he being taken in *Cornwall* must be tried there, and that therefore it might be saved. But *per Curiam*: This being an Affirmative Statute, doth not take away the

The Trial by the Common Law where the Offence was committed: And agreed to save the Recognizance. Pengell and Dr. Enton's Case. 2 Keb. 31.

Of Stealing Wives.

Information was exhibited in the Name of Sir Tho. Fanshawe (Clerk of the Crown, and so to this Purpose, Attorney for the King) against T. and others, for taking and marrying the sole Daughter and Heir apparent of T. of Kent, without the Assent, and against the Will of the Father; and this was an Information for Offence at Common Law: And the Evidence was, that T. was oftentimes at her Father's House, and in her Company; and there he secretly contracts himself to his Daughter, she being fifteen Years of Age; and by Appointment between him and his Daughter left her Father's House, and met T. who came with Horses from London to Kent, and brought the Daughter to London, and there were married. And upon the Evidence the Jury at the Bar found them guilty. The Cause being prosecuted by the Father and Mother, who gave Evidence against them, they prayed the Fine might be moderated, and were discharged out of Prison upon Bail. And all agreed that this was an Offence punishable by Fine and Imprisonment at Common Law. Sid. 387. *The King against Twifleton*; and the Statutes 4 & 5 P. & M. & 3 H. 7. 2. were but Aggravation of Punishment, and do not create any Offence originally. 2 Keb. 432.

By the 4 & 5 of Ph. & M. c. 1. No Person shall take or convey, or cause to be taken and convey'd away, any Maid or Woman Child within

Two Years Imprisonment for taking a Female under 16 from her Guardians.

within the Age of sixteen Years, out of or from the Possession, and against the Will of the Father or Mother of such a Child ; or out of and from the Possession, and against the Will of such Person or Persons, as then shall happen to have by any lawful Ways or Means, the Order, Education, or Government of such Maiden, or Woman Child, on Pain of Imprisonment, or Fine, &c.

Five Years Imprisonment for lying with her, or marrying her.

That whoever shall take away and deflower such Woman Child, or by secret Letters, Messages, or otherwise, contract Matrimony with such Maiden or Woman Child, without the Consent of the Father, Guardian, &c. shall suffer five Years Imprisonment, &c.

If she consent the Lands go to the next of Kin.

If such Child shall be above the Age of twelve Years and under sixteen, and consent to any such Contract of Matrimony ; the next of Kin to whom her Inheritance should come, shall enjoy it during her Life ; after her Decease, it may come to her Issue, but never to the Man that married her.

Two indicted upon the above-said Statute.

Bastian the Father, and *Bastian* the Son, were indicted upon this Statute, for taking of one *M.* out of the Custody of *Coretier* her Guardian, and marrying her to the said *Bastian* the Son, she being under the Age of sixteen Years, against the Will of the said *Coretier* her Guardian, and contrary to the Statute : On a Trial at Bar in *B. R.* it appeared upon the Evidence, that *F.* the Father of the Infant, being an Ale-house-keeper and Freeman of *London*, made his Will and devised the Custody of his said Daughter to the said *Coretier*, and died ; she being then in the Country : That the said *Coretier* obtain'd a Warrant from the Mayor of *London* to take her into his Custody, and she was taken thereupon, but

But rescued ; and he afterwards obtained a War-
rant from the Chief Justice, and took her, she
being before married to the said *Bastian* the Son.
It was resolved by the Court, that the Defen-
dants could not be found guilty upon this In-
dictment, because the Infant was not in the
Possession of the said *Coretier*, as the Indictment
supposes ; for the Father being a Freeman of
London, that Devise as to his Daughter, (*scilt.*)
the Disposition of her Person, was void, and
the Infant remained in the Custody of the Mayor
and Aldermen of *London* by the Custom, and
the Indictment ought to have been for taking
her out of their Custody. Secondly, that this
being a Penal Law, the Person of the Infant
ought to be in the actual Custody of him or
them, in whom the Indictment supposes the
Right. Thirdly, That he, out of whose Posses-
sion she is supposed to be taken, ought to have
the mere Right, because the Statute says, from
the Possession of such Person and Persons, as shall
by any lawful Ways and Means have the Cu-
stody, &c. Otherwise 'tis not an Offence against
that Statute. And another Indictment might
have been preferr'd, for taking her out of the
Possession of her lawful Guardians : And the
Custom of *London* concerning Orphans is saved.
Rex vers. Bastian the Father and *Bastian* the
Son. *Siderfin* 362.

*The Infant
must be taken
out of the Pos-
session of the
Guardian.*

*Freeman can't
devise the Cust-
ody of his
Child.*

*The Infant
must be in the
actual Possessi-
on of the Guar-
dian.*

*The Person
from whom the
Infant is ta-
ken, must be
the lawful
Guardian, or
it is no Offence
against the
Statute.*

Harwood was committed to *Newgate* by the
Court of Orphans, for marrying an Orphan
without their Licence, and refusing to pay a
Fine of 40 *l.* imposed upon him for his Offence,
or to give Security ; and it was shewn on the
Return of the *Habeas Corpus* into *B. R.* That the
Orphan's Portion amounted to 800 *l.* It was re-
solv'd by all the Court of King's Bench, that he
should

*One committed
to Newgate
for marrying
an Orphan.*

It is not material whether the Offender be a Freeman or not.

Or whether the Marriage be in London or a foreign County.

Inticing a young Heir to marry his Sister when he was drunk.

should be remanded; and that it is not material whether the Offender be a Freeman or not, or whether the Marriage were in London, or a foreign County; and that the Court of Orphans might have a *Ravishment de Gard* in whatever County the Orphan was; but held that they could not award Process into a foreign County. They held also that the Fine of 40 l. was not unreasonable; but in regard there was no Disparagement by the Marriage, it was propounded by the Court, that upon *Harwood's* Submission, the Court of Orphans would do well to remit the Fine. 1 *Vent.* 178.

One was fined for inveigling the Son and Heir of *J. S.* being but Seventeen, to marry his Sister when he was drunk. *Cra. Car.* 557.

Offences against Penal Laws.

In the Time of *K. Charles I.* the Lady *Fullwood*, *Roger Fullwood*, and divers others, were indicted in the County of *Surrey*, that whereas *Sarah Cock* was a Maid who had a Portion of 1300 l. the said *Roger*, by Procurement of the Lady, at the Parish of *St. Saviour*, violently, and with Force, and against the Will of the said *Sarah*, took and carried the said *Sarah* to *St. Saviour's*, and there married her against the Form of the Statute. They plead not guilty. The said *Roger Fullwood*, *R. B.* and *J. H.* were indicted in the County of *Middlesex*, *de eo quod* the said *Sarah* having a Portion of 1300 l. for Lucre of the Gain of the said Portion, they took her at *N. in Com. Midd'* against her Will, and carried her to *St. Saviour's* in *Surrey*, and there the said *Roger* married the said *Sarah* contra formam Statuti; and a Copy of the Indictment in *Midd'*

Midd was allowed them. It was in this Case agreed, that the Taking of a Woman, unless she be married or defiled, is not Felony within the Statute; and if the Taking of such a Woman, and the Marrying or Defiling be in several Counties, it is Felony compounded of all the three Parts, as Stroke and Death are but one Murder. *Rex Curiam*: Altho' it had been objected, that it was an obsolete Statute, yet they were deceived, for the Statute is good, and of good Use; but many had not been executed thereupon, because they had their Clergy: For the taking whereof away, the Stat. 39 *Eliz. cap. 8.* was made. And whereas it was pretended, that *Sarah* was married with her Consent, and therefore not within the Statute; the Court said, That the Taking being unlawful, and against her Will, tho' the Marriage was with her Will, yet it is Felony within the Statute: And altho' this was not a Marriage *de jure*, because she was in such Fear that she knew not what she answered or did; yet it is a Marriage *de facto*, and is Felony within the Statute; and Judgment was given that they should be hanged.

31 *H. 8. Rot. 14. inter placita Regis*: Henry Sturges and Philip Sturges were indicted for taking one *Agnes Hobson* against her Will, who was the Daughter and Heir of *John Hobson*, who was seised of Lands of 20 *l. per Annum* Value. And they pleaded to the Indictment, that they ought not to answer *pro eo quod non mentionatur* in the said Indictment, *quod ceperunt ad intentionem maritandi dictam Agnetem vel ad prostituendam, &c.* and they were discharged.

Hill. 3 & 4 P. & M. Rot. 10. Roger Tompson and Peter Rewley were indicted *pro eo quod Felonice ceperunt Margaretam Burton & Margaretam*

ream Burton, Daughters and Coheirs of Roger Burton deceased, and against their Wills, &c. And they pleaded they ought not to answer to the said Indictment, pro eo quod non apparet in quo loco nec quomodo they took the said Daughters, and pro eo quod non mentionatur in dicto indictment, that the said Roger or Peter married or defiled the said Margaret or Margery, ils aleront sans jour.

Stat. P. and M. explained.

Tho' the Words in the Purview of the Statute of P. and M. seem to be general, and to extend to all Women unlawfully taken against their Wills; yet considering that the Preamble of the Statute cannot be conceived to be idle, it must be intended to restrain the Purview to the particular Cases in the Preamble mentioned, (*viz.*) that they shall be Maids, Widows or Wives, their Substance in Lands or Goods, or otherwise Heir apparent, that the Motive be Lucre, and the End to be married or defiled, and the Purview is what Person or Persons should steal away a Woman (so) against her Will unlawfully: This Word (so) did bind up the Preamble to the Purview. *Cro. Car. 484, 488, 491.*

In *Fallwood's Case*, divers Witnesses proved that she was willing to marry him, and appointed a Taylor to make her a Gown, and was found in Bed with him: But she made Oath that she did it for fear of his Threats, and that she knew not what she did. It was not expressed in the Indictment that they took her *ea intentione* to marry or defile her, as in the Case of 31 H. 8. but the Court resolved it was good; for in regard it appears apparently by the Indictment, that they took her & *abduxerunt* for Lucre, and the same Day married her, that shews the Caption to be with an Intent to marry her; and there

there be no such Words in the Statute as *ea intentione*.

Information for Recusancy. *Vide supra Tit. Information.*

A. steals his Wife against her Friends Consent, and after sues in Equity for her Portion; but denied Relief by *Egerton* Chancellor, who said, *He that steals the Flesh, let him provide Bread how he can*, he shall have no Relief in Equity.

Note; By the express Purview of this Statute, the Accessary, or both, before and after, are made Principals, as the Receivers of the Woman. *2 Co. 20, 21.*

Femē Coverts, Keepers of Gaols, shall be chargeable in Debt for the Escape of a Prisoner. *2 Inst. 382.* and so *Infants*.

Swensden was indicted, with others, upon the Stat. of the 3 H. 7. c. 4. for forcibly taking and marrying *Mrs. Pleasant Rawlins* an Heiress; it appeared that he had procured her and her Aunt to be arrested in a sham Action, and that he married *Mrs. Rawlins* while she was under that Restraint: It was prov'd also that she had, before that Time, expressed herself desirous of marrying him, and at the Time of the Marriage consented to it; yet seeing she was not privy to the Contrivance of the Arrest, or met him then by Consent, but he marry'd her when she was under that Force; the Court held that her subsequent Consent was not to be regarded, and that the Marriage should be taken to be the Effect of Force; and accordingly he was condemn'd and executed. And it was said further, that altho' *Swensden* had known nothing of the first Force, yet he knowing her to be under that Restraint when he marry'd her, was nevertheless guilty. *6 Mod. 101.*

Marrying an Heiress, while under Arrest in a sham Action, Felony.

Rape.

A Man of 60 Years of Age, who had a Wife was arraigned at *Newgate*, 22 *Jac.* of the Rape of a Girl then of the Age of 7 Years, and no more, by the apparent Evidence of divers Women, and the Surgeon, and the Damsel herself; and he was hanged. *Dyer* 304. in *Margin.*

What amounts to a Rape.

An Attempt upon a Woman, without actual Penetration and Emission, cannot amount to a Rape. 3 *Inst.* 60.

Consent obtain'd by Threats will not excuse, or Consent after.

This Offence is not mitigated by shewing the Woman at length yielded to the Violence, if her Consent proceeded from Fear of Death or Dangers, &c. Nor will it excuse the Offender, should she consented after the Fact. *Dalton*, cap. 118.

Complaint ought to be made in reasonable Time. Good Plea that she was his Concubine. None she was a common Whore.

And it is not material whether she conceived or not, as was the old Opinion: It is held to be a strong Presumption against the Woman, if she make no Complaint in a reasonable Time; but this will not conclude her. It has been allow'd a good Plea in an Appeal of Rape, to say that before the Rape suppos'd she was his Concubine. *Dalton*, cap. 118. But it will not avail to say she was a common Whore.

Rape to lie with a Girl under ten, tho' she consents.

By the 18 *Eliz.* cap. 7. It is enacted, that whoever shall unlawfully and carnally know a Woman Child under the Age of ten Years, shall suffer as a Felon without Benefit of Clergy; and that whether such Child consent or not.

All who assist are Principals. Lord Audley executed for assisting one to ravish his Lady.

All who assist are deem'd Principals, whether Men or Women; and my Lord *Audley* was condemn'd and executed, for assisting his Servant to commit a Rape upon the Body of his own Wife, and the Lady was admitted an Evidence of the Fact against him. *Vide* my Lord *Audley's* Trial.

Per-

Perjury.

Baron and Feme convicted of Perjury, she only was taken; and Counsel pray'd that she might stay till the Baron comes in to receive Judgment together; which the Court deny'd, and the Indictment was joint, which was well enough: So of the Issue jointly taken. 1 *Keb.* 585. *The King and Chedwick.*

Information was brought against a Feme Covert for selling Fish. *Twisden*, notwithstanding *Hob. Moor* and *Hussey's Case*, conceiv'd this lay not against her, but against the Husband alone, 11 *Co.* 64. being his Contract; to which the Court inclin'd. 2 *Keb.* 634. *The King against Jordan.*

M. 24 *Car.* 2. *B. R.* *The King against Storey*: The Court fined him 100 *l.* and Good Behaviour for five Years, on Information for deceitful taking away, out of her Mother's Custody, *Mrs. Gilbourne*, under 16 Years old, with Intent to marry her, and well; *Geery* 50 *l.* and Good Behaviour for a Year; *Lenthall* 40 Marks, who were Women guilty of the Exploit, and found guilty only of the Deceit. 3 *Keb.* 101.

For all Statutes which provide for actual Wrong, a Feme Covert shall be intended within them. 9 *H.* 8. 6. If a Feme Covert make actual Dissension with Force, she shall be imprisoned. 9 *H.* 4. 7. 6.

Precedents.

Debt upon an Obligation made to a Feme Sole and another, the Wife of B. V. and the Husband dissents from the Obligation, and the other Obligee brings the Action.

Easter, 28. Eliz. Roll 112.

¶ *J.* B. was summon'd to answer Susan C. of a Plea that he render her 40 *l.* which he owes her, and unjustly detains, &c. and whereupon, &c. she says, That whereas the aforesaid *J.* (such a Day and Year) at *A.* by his certain Writing obligatory acknowledged himself to be held to the same *S.* and *H.* at that Time Wife of *B. V.* in the aforesaid 40 *l.* to be paid to the said *S.* and *H.* at such a Feast then next following; and the aforesaid *B.* after the making the aforesaid Writing, and before the Day of suing out the original Writ of the said *S.* having Notice that the aforesaid *J.* by the same Writing was held and firmly bound to the aforesaid *S.* and *H.* then and yet the Wife of him *B.* in the aforesaid 40 *l.* from the said Writing after the said Notice, and before the Day of suing the original Writ of the said *S.*

to

to wit, such a Day and Year at *A.* aforesaid, disagreed, and the Writing aforesaid then as the Deed of the aforesaid *H.* to accept utterly refused; nevertheless the said *J.* tho' oftentimes requested, the said 40 *l.* to them *S.* and *H.* before the aforesaid Refusal of the said *B.* or to the same *S.* after the Refusal of the same *B.* hath not paid but, &c.

Easter, 33 Eliz. Roll 1940.

Gabriel Child, and Agnes his Wife, who was the Wife of Thomas Henerey, Demand against Eliz. Coningby Widow, and Henry Henerey, the third Part of two Messuages, with their Appurtenances in *R.* as her Dower of the Endowment of the said *T. H.* her Husband.

And the aforesaid *Eliz.* and *Henry*, by *J. R.* their Attorney, come and say, that the aforesaid *Gabriel* and *Agnes*, Dower of said *Agnes*, of the Tenements aforesaid, with the Appurtenances thereof, &c. of the Endowing of the aforesaid *T.* formerly her Husband, ought not to have, because they say that the aforesaid *T.* in his Life was seised of the Tenements aforesaid, with the Appurtenances, in his Demesne as of Fee; which Tenements, with the Appurtenances are, and from the Time of the Death of the aforesaid *T.* were of the clear yearly Value of 12 *l.* beyond all Charges and Reprizes; and the said *T.* so of the Tenements aforesaid, in Form aforesaid, being seised at *R.* aforesaid, marry'd the aforesaid *Agnes*; and after the Marriage celebrated between them, *T.* and *Agnes*, to wit, such a Day and Year at *R.* aforesaid, made his Last Will in Writing, and by

Bar that her former Husband, &c. granted a yearly Rent of 20 *l.* to the Demandant, in Satisfaction of her Dower.

the same Will devised to the aforesaid *Agnes*, then his Wife, an annual Rent of 20 *l.* *Money* *Gr.* to be receiv'd out of all the Lands and Tenements of the said *T.* in the Parish of *R.* and *T.* aforesaid, by two half-yearly Payments; the first Payment thereof to begin at the End of the first six Months next after the Decease of the same *T.* and so in every Half Year during the natural Life of the said *Agnes*, in full Satisfaction of the whole Dower of the said *Agnes*, to her of the Lands and Tenements of the said *T.* happening, and afterwards at *R.* aforesaid died, of the Lands and Tenements aforesaid, with the Appurtenances in Form aforesaid seised; after whose Death, and before the saing the Writ aforesaid, to wit, such a Day and Year, the said *Agnes*, at *R.* aforesaid, whilst she was sole, the aforesaid yearly Rent of 20 *l.* in full Satisfaction of the whole Dower of the said *Agnes* of the Tenements aforesaid, with the Appurtenances happening, agreed to accept; and this they are ready to aver; wherefore they pray Judgment, whether the aforesaid *Gabriel* and *Agnes* ought to have the Dower of the said *Agnes* of the Tenements aforesaid, with the Appurtenances of which, *Gr.* of the Endowment of the aforesaid *T.* her former Husband, *Gr.*

Replication.
The Deman-
dants say, that
the Wife did
not agree to
accept.

And the aforesaid *G.* and *A.* say, that they, by any Thing before alleg'd from the Dower of the said *Agnes* of the Tenements aforesaid, with the Appurtenances whereof, *Gr.* ought not to be precluded, because they say that the said *Agnes*, whilst she was sole, did not agree to accept the aforesaid annual Rent of 20 *l.* in full Satisfaction of the whole Dower of the said *Agnes*, happening to the said *Agnes* of the Tenements aforesaid, with the Appurtenances, as the

the aforesaid E. and H. have above alledg'd; and this they pray may be inquired by the Country, &c. 4 Co. *Vernon's Case*; it is adjudg'd, that this Bar is good, and within the Equity of the Statute of 27 H. 8. Of Jointures.

Count in Dower.

A Who was the Wife of R. D. by A. D. her Attorney demands against J. D. a third Part of the Manors of O. and N. with the Appurtenances, and of ten Messuages, ten Tofts, ninety Acres of Land, with the Appurtenances in C. as the Dower of the said A. of the Endowment of the aforesaid R. formerly her Husband, and whereof she hath nothing, &c.

Plea N'unique seise que Dower.

And the aforesaid J. by ——— his Attorney, comes and says, that the aforesaid A. her Dower of the Tenements aforesaid, whereof, &c. against him ought not to have, because he says that the aforesaid R. D. formerly the Husband of the said A. of whose Endowment, &c. neither on the Day on which he the said R. marry'd her the said A. nor ever afterwards was seised of the Tenements, with the Appurtenances whereof, &c. of such an Estate, so that the same A. he could thereof endow; and of this he puts himself upon the Country; and the aforesaid A. likewise; therefore, &c.

Plea of the Acceptance of an Annuity in Satisfaction of Dower.

And the aforesaid J. by ——— his Attorney, comes and says, that the aforesaid A. her Dower of the Tenements aforesaid, with the Appurtenances of the Endowment of the aforesaid J. H. formerly her Husband, ought not to have, because he says, that long before the Time of suing out the Original Writ of the said A. to wit, (such a Day and Year) at B. the aforesaid J. assigned to the aforesaid A. an Annuity or yearly Rent of six Pounds of lawful Money of Great Britain, issuing out of all the Lands and Tenements aforesaid, with the Appurtenances; To have and to hold to the same A. for the Term of her Life, in the Name of her Dower, issuing out of all the Lands and Tenements aforesaid that belonged to the aforesaid J. H. formerly her Husband, &c. which Rent of six Pounds the aforesaid A. accepted in full Satisfaction of her whole Dower of all the Lands and Tenements aforesaid that belonged to the aforesaid J. to her happening. And this, &c. Wherefore he prays Judgment if the aforesaid A. her Dower of the Tenements aforesaid, with the Appurtenances, ought to have, &c.

Replication that she did not accept.

And the aforesaid A. says, That she, by any Thing before alledg'd of her Dower aforesaid, ought not to be precluded, because protesting that she did not accept the aforesaid Annuity, or yearly Rent of six Pounds of lawful Money of Great

Great Britain, in full Satisfaction of her whole Dower of all the Lands and Tenements aforesaid, with the Appurtenances that belonged to the aforesaid *J. H.* happening to her as the aforesaid *J.* above hath alledged; The same *A.* says that the aforesaid *J.* did not assign to her the said *A.* the aforesaid Annuity or yearly Rent of Six Pounds of lawful Money of *Great Britain*, issuing out of the Tenements aforesaid with the Appurtenances, to have and to hold to the same *A.* for the Term of her Life in the Name of Dower of all the Lands and Tenements aforesaid, that belonged to the aforesaid *J. H.* formerly her Husband, &c. as the said *J.* hath above alledged; and this she is ready to aver. Wherefore she prays Judgment, and that she of the Tenements aforesaid with the Appurtenances may be endowed, &c.

And the aforesaid *J.* as before says, That the aforesaid *J.* assigned to the aforesaid *A.* the aforesaid Annuity or yearly Rent of Six Pounds, issuing out of the Tenements aforesaid with the Appurtenances, to have and to hold to the same *A.* for the Term of her Life, in the Name of her Dower of all the Lands and Tenements aforesaid, that belonged to the aforesaid *J. H.* formerly her Husband, as the said *J.* hath above alledged. And of this he puts himself upon the Country, &c.

Plea Elopement.

And the aforesaid *A.* by - - - his Attorney comes and says that the aforesaid *K.* her Dower of the Tenements aforesaid, with the Appurtenances of the Endowment of the aforesaid *I.* ought not to have, because he says that the aforesaid

foresaid *K.* in the Life of the foresaid *J.* to wit, (such a Day and Year) at *W.* in the County of *L.* of her own Choice left the foresaid *J.* her Husband, and from him went away and eloped with one *T. W.* and with the same *T. W.* at *K.* in the County of *L.* aforesaid, in Adultery continued during the whole Life of him *J.* in no wise reconciled to the aforesaid *J.* her Husband, in the Life of him the said *J.* and of this, &c. Wherefore, &c. if her Dower of the Tenements aforesaid with the Appurtenances of the Endowment, &c. in this Behalf she ought to have, &c.

And the aforesaid *K.* says that she by any Thing before alledged from her Dower aforesaid of the same Tenements, with the Appurtenances of the Endowment of the aforesaid *J.* formerly her Husband, against the aforesaid *A.* ought not to be precluded, because she says that she in the Life of the aforesaid *J.* did not leave him *J.* her Husband, nor from him went away with the aforesaid *T. W.* nor staid with him in Adultery, as the aforesaid *A.* hath above alledged. And this she prays may be enquired by the Country, &c.

Bar by the Acceptance of a Jointure with a Recital of the Statute of 27 H. 8.

And the aforesaid *T. H.* by - - - - his Attorney, comes and says that the aforesaid *R.* and *D.* the Dower of the said *D.* of the Tenements aforesaid with the Appurtenances whereof, &c. of the Endowment of the aforesaid *D.* formerly her Husband, &c. ought not to have, because he says that in a Statute in a Parliament of our Lord *Henry* the Eighth, late King of *England*, begun at the City of *London* the

the Third Day of *November* in the Twenty-first Year of his Reign, and from the same City to his Palace at *Westminster* in the County of *Middlesex* adjourned and prorogued, and then and there continued until and on the Seventeenth Day of *December* then next following; and from the same Day and Place by diverse Prorogations until and upon the Fourth Day of *February* in the Twenty-seventh Year of his Reign, continued and prorogued; amongst other Things it is enacted, ordained, and established by the Authority of the same Parliament, that whereas divers Persons had purchased; or had Estates made and conveyed of and in divers Lands, Tenements and Hereditaments unto them and to their Wives, and to the Heirs of the Husband, or to the Husband and to the Wife, and to the Heirs of their two Bodies begotten, or to the Heirs of one of their Bodies begotten, or to the Husband and to the Wife for Term of their Lives, or for Term of Life of the said Wife. Or where any such Estate or Purchase of any Lands, Tenements, or Hereditaments hath been, or hereafter shall be made to any Husband and to his Wife, in Manner and Form above expressed, or to any other Person or Persons, and to their Heirs and Assigns, to the Use and Behoof of the said Husband and Wife, or to the Use of the Wife as is above rehearsed for the Jointure of the Wife; that then in every such Case every Woman married having such Jointure made, or hereafter to be made, should not claim nor have Title to have any Dower of the Residue of the Lands, Tenements or Hereditaments, that at any Time were her said Husband's by whom she had any such Jointure, nor should demand nor claim her Dower of and against them that have

have the Lands and Inheritances of her said Husband: But if she have no such Jointure, then she should be admitted and enabled to purchase, have and demand her Dower by Writ of Dower, after the due Course and Order of the Common Laws of this Realm; this Act or any Law or Provision made to the contrary thereof notwithstanding, as in the same Act is more fully contained. And the said T. H. further says, that the aforesaid late King Henry the Eighth was seised of the Scite, &c. in &c. in his Demesne as of Fee, and being so thereof seised, the said late King afterwards, to wit, (such a Day and Year) by his Letters Patent, bearing Date at *Westminster* the same Day and Year, of his Special Grace, and of his certain Knowledge and mere Motion did give and grant to the aforesaid Duke in his Life-time, and to the said Dutches, then his Wife, the aforesaid Scite, &c. to have and to hold to the said Duke and Dutches for the Term of their Lives, and the Life of the longer Liver of them, the Remainder thereof after the Death of them the said Duke and Dutches, to the Heirs of the Body of the said Duke begotten; by Pretext of which said Letters Patent, the aforesaid Duke and Dutches were of the aforesaid Scite, &c. with the Appurtenances seised, to wit, the said Duke in his Demesne as of Fee-Tail, and the aforesaid Dutches in her Demesne as of Freehold; and being so seised, the said Duke afterwards at H. in the County of S. died, and the aforesaid Dutches survived him, and held herself in the aforesaid Scite with the Appurtenances, and was and yet is thereof seised in her Demesne as of Freehold by Right of Survivorship, and the Profits and Issues thereof, by agreeing and consenting to the

the said Jointure, from the Time of the Death of the aforesaid Duke hitherto she hath continually received and had; and this he is ready to verify. Whereupon he prays Judgment, if the aforesaid R. and Dutcheſs, the Dower of the said Dutcheſs of the Tenements aforesaid with the Appurtenances in the Demand aforesaid above specified ought to have, &c.

Appeal for the Death of her Husband, against the Principal and Accessaries.

Hertford, 2 *E. D.* late of, &c, otherwise called *E. A.* late of, &c. *J. W.* late of, &c. and *L. B.* late of, &c. were attached by their Bodies to answer to *P.* who was the Wife of *T. S.* Gent. of the Death of the aforesaid *T. S.* formerly her Husband, whereof she appeals them, and there are Pledges to prosecute, to wit, *T. A.* of *London*, Gent. and *W. E.* of, &c. And whereupon the same *P.* by *T. W.* the Younger, and *J. T.* her Attornies jointly and severally according to the Form of the Statute, &c. instantly appeals the aforesaid *E. D.* *J. A.* *J. W.* and *L. B.* that whereas the aforesaid *T. S.* was with them in the Peace of our Lord the King, then at *S.* aforesaid, in the County of *Hertford* aforesaid, the Sixth Day of *May* in the Year, &c. about the Fourth Hour after Noon of the same Day, there, to wit, at *S.* aforesaid, in the County of *Hertford* aforesaid, came the aforesaid *J. A.* *J. W.* and *L. B.* and feloniously and as Felons of our said Lord the now King, of their Malice aforethought and premeditated Assault against the Peace of our said Lord the King, his Crown and Dignity, at the Day, Year, Hour and Place, and County of *Hertford* aforesaid, and

and on the aforesaid T. S. then at S. aforesaid, in the County of *Hertford* aforesaid made an Assault, and the aforesaid L. B. with a certain Sword made of Iron and Steel, called a Rapier, of the Value of Three Shillings and Four Pence, which the same L. in his Right Hand, then and there the same Sixth Day, &c. at S. aforesaid, in the County of *Hertford* aforesaid, had and held, the aforesaid T. S. in and upon the Right Knee of the same T. S. then at S. aforesaid, feloniously, voluntarily, and of his Malice aforethought did strike and prick, giving to the same T. S. then and there, to wit, at S. aforesaid, with the Sword aforesaid, in and upon the Right Knee of him the said T. S. aforesaid one mortal Wound of the Depth of Six Inches, and of the Breadth of One Inch, of which mortal Wound the aforesaid T. S. then at S. aforesaid in the County of *Hertford* aforesaid instantly died: And the aforesaid J. A. and J. W. at S. aforesaid, feloniously, and of their Malice aforethought were then present, aiding, abetting, procuring, counselling, and maintaining the said L. B. the Felony and Murder aforesaid, in Form aforesaid, feloniously to do and perpetrate against the Peace of the said Lord the King that now is, his Crown and Dignity; and so the aforesaid L. B. J. A. and J. W. the aforesaid T. S. the said Sixth Day of May, Year, &c. at S. aforesaid in the County of *Hertford* aforesaid, feloniously, voluntarily, and of their Malice aforethought, killed and murdered, against the Peace of our said Lord the now King, his Crown and Dignity, and the aforesaid E. D. before the Felony and Murder aforesaid, in Form aforesaid done, to wit, the Fifth Day of May in the Year, &c. at S. aforesaid

in

in the said County of *Hertford*, the same *L. B. J. A.* and *J. W.* to do and perpetrate the Felony and Murder aforesaid, in Form aforesaid, of his Malice aforethought maliciously and feloniously incited, procured, and counselled, and also *J. D.* knowing the aforesaid *L. B. J. A.* and *J. W.* the Felony and Murder aforesaid, in Form aforesaid, to have done, them the said *L. B. J. A.* and *J. W.* afterwards, to wit, the aforesaid Sixth Day of *May*, &c. at *S.* aforesaid, in the County of *Hertford* aforesaid, after the Felony and Murder aforesaid, by them *L. B. J. A.* and *J. W.* in Form aforesaid done, feloniously received, concealed, lodged, and comforted, and helped, excited, and counselled them to fly and escape for the Felony and Murder aforesaid, against the Peace, and so forth: And as soon as the said Felons had done the Murder aforesaid, in Form aforesaid, and fled, the said *P.* made fresh Pursuit after them from Town to Town unto the Four next Towns and farther, until, and so forth. And if the said Felons will deny the Felony and Murder aforesaid, charged upon them in Form aforesaid, the aforesaid *P.* is ready to prove it against them as the Court shall award, and so forth.

And the aforesaid *E. D. J. A. J. W.* and *L. B.* in their proper Persons come and defend the Peace and Injury when, &c. and all the Felony and Murder, and whatever else, &c. and separately say, that they in nothing are thereof guilty; and thereupon of good and evil they separately put themselves upon the Country; and the aforesaid *P.* doth the like; therefore, &c.

Debi

Debt upon an Obligation against an Administratrix, the Defendant pleads plene Administravit; the Plaintiff replies that he hath sued an original Writ against the Defendant and her Husband, and proceeded to Issue, and it abated by the Death of the Husband, and he freshly exhibited his Bill.

- Ought not to be precluded, because she says that long before the Exhibiting the Bill aforesaid, to wit, (such a Day and Year) the same Plaintiff for the Recovery of the Debt aforesaid, to him in Form aforesaid being behind and unpaid, sued out of the Court of Chancery of our said Lord the King that now is, the aforesaid Court of Chancery at *Westminster* in the County of *Middlesex* then being, a certain original Writ of the said Lord the King against one J. S. late of *Essex* and the said *Elizabeth*; then his Wife, Administratrix of the Goods and Chattels which belonged to E. S. who died intestate, and so forth, directed to the then Sheriff of *Essex*, by which original Writ it was commanded to the then Sheriff of *Essex*, that he should command the aforesaid J. and *Elizabeth*, that justly and without Delay they should render to the said (the Plaintiff) the aforesaid 40 l. which they unjustly detained from him; and unless they did it, and if the aforesaid (the Plaintiff) should give the aforesaid then Sheriff Security to prosecute his Complaint, that then he should summon by good Summoners the aforesaid J. and *Elizabeth*, that they should be before the Justices of the said Lord the King at *Westminster*, on the Octave of Saint *Hilary*, to shew why they did it not; and that the said Sheriff

riff should have there the said Summoners and that Writ; and afterwards on the Octave of Saint *Hillary* aforesaid, before the Justices of the said Lord the King at *Westminster*, the aforesaid *J.* and *Elizabeth* appeared to the Writ aforesaid, and the aforesaid (the Plaintiff) declared thereupon against them; and the aforesaid *J.* and *Elizabeth* thereupon pleaded to Issue; and afterwards, to wit, such a Day and Year at *H.* aforesaid in the Parish and Ward aforesaid, the said *J.* died, and by Reason thereof the original Writ aforesaid and the whole Process thereupon was quashed, and the said (the Plaintiff) recently afterwards exhibited his the said Plaintiff's Bill here, in the Court of our said Lord the King, against the aforesaid *Elizabeth*; and the aforesaid Plaintiff further says that the original Writ aforesaid was prosecuted, and the Bill aforesaid was exhibited against the said *Elizabeth* for the Debt aforesaid, and not for another Debt: And the said (the Plaintiff) further says, that at the Time of suing out the aforesaid original Writ, the aforesaid (the Defendant) had divers Goods and Chattels, which belonged to the aforesaid *E. S.* at the Time of his Death in her Hands, to be administered to the Value of the Debt aforesaid; whereof the said (the Defendant) the said (the Plaintiff) of his Debt aforesaid might have satisfied, to wit, at *H.* aforesaid in the Parish and Ward aforesaid, and of this, &c. Whereupon, &c.

And the aforesaid (the Defendant) says that the aforesaid (the Plaintiff) did not recently Exhibit the Bill of the said Plaintiff in the Court of our said Lord the King, here against the said (the Defendant) in Manner and Form as the aforesaid (the Plaintiff) above

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there-

Precedents.

thereupon in Pleading hath alledged; and of this she puts herself upon the Country, &c.

Barr to a Bond.

That the Action lies not, because he says that after the making of the Writing aforesaid, the aforesaid *R. T.* in his Life-time at *C.* aforesaid, made his Testament and last Will in Writing, and by his said Testament did constitute and ordain the aforesaid *Elizabeth* Executrix of his said Testament, and afterwards died; after whose Death the said *Elizabeth*, the aforesaid Testament of the aforesaid *R. T.* in due Form of Law, proved, and took upon herself the Burthen of the Execution of the said Testament; and afterwards, and before the Day of suing out of the original Writ of the said *Elizabeth*, to wit, (such a Day and Year) the said *Elizabeth* at *C.* aforesaid took to Husband the aforesaid *J. H.* and by Reason thereof, as well all Actions upon the aforesaid Writing obligatory to be had, as the aforesaid Debt of Ten Pounds upon the aforesaid Writing obligatory demanded, were and are utterly extinguished in Law, and became discharged and are discharged: And this he is ready, &c.

Action brought by a Man and his Wife for scandalous Words, that she had a Child, while she was single.

Suffex. *B.* *P.* Gentleman, and *C.* his Wife complain of *E. A.* in Custody of the Marshal, &c. for that, to wit, that whereas the same *C.* was of good Name, Fame, Condition, Conversation and Behaviour from the Time of her Birth hitherto, and while she was

was Single, not only led an honest and unspotted Life, but also behaved, carried and governed herself as a chaste Woman, without any corrupt, unchaste, depraved or evil Manner of living, remaining untouched and unspotted, and being descended from a worshipful and gentle Family in the County aforesaid; by Reason of which, the said C. not only procured to herself the good Will and Friendship of her Kinred, but also of many others, the Liege Subjects of our Lord the King: And whereas one M. R. Genl. Grand Uncle of the said B. gave divers great yearly Presents to the said B. and was minded to leave all his Lands and Tenements after his Death to the said B. (he not having any Child the Issue of his own Body) the aforesaid (the Defendant) not being ignorant of the Premises, and perceiving that the said B. had plighted his Faith to the said C. for the Cause of Marriage, and that he had intended to marry the said C. he, the said (the Defendant) with a malicious Mind contriving and intending not only the good Name and Fame of the aforesaid C. to hurt, but also to him the said B. into so much Hatred and Displeasure with M. R. his said Uncle to draw, that the said Uncle all his Lands and Tenements to other Persons after his Death should convey and assure; and the aforesaid B. thereof should utterly disinherit C. after the Marriage between them the said B. and C. celebrated, (to wit, such a Day and Year,) at, &c. said, spoke, and published to the Uncle aforesaid and Anne his Wife, in the Presence of very many credible Subjects of our Lord the King that now is, of the aforesaid C. while she was Sole, these false, feigned and scandalous Words following, to wit, J. (meaning him the

H h 2

said

said *E. A.* now the Defendant) *wonder that you* (meaning the Uncle aforesaid) *will bestow your Kinsman* (meaning him, *B.* the now Plaintiff) *on that base Woman* (meaning *C.* the Wife of the aforesaid *B.* now the Plaintiff) *for she* (again meaning her the said *C.*) *hath had a Child*; whereas in Truth the said *C.* at the Time of speaking and publishing of those Words, and the whole Time of her Life until the Marriage solemnized between the said *B.* and *C.* remained in her pure Virginity, and had no Issue. By Reason of the speaking and publishing of which scandalous Words, the same *C.* is not only much hurt and blackened in her good Name, Fame and Estimation, which she enjoyed before; but also the said *B.* fell into the great Displeasure and Hatred of the aforesaid *A. R.* and lost divers yearly Allowances which the aforesaid *A. R.* his Uncle used to give him, and hath desisted from doing the same any longer; and the said *A. R.* the Uncle of the said *B.* giving Faith to the aforesaid scandalous Words of the said *E.* because that the said *B.* married the said *C.* his Lands and Tenements of the yearly Value of One Hundred Pounds to divers Persons to the said *B.* unknown, to be held after the Death of the said *A.* his Uncle, conveyed; and the said *B.* and *C.* from the Time of the Marriage aforesaid to this Day, are thereby greatly impoverished. Whereupon the said Plaintiffs say that they are the worse, and are damaged to the Value of 3000*l.* And thereupon they bring their Suit.

Declaration

Declaration in Covenant brought by a Man and his Wife, where the Lessor enters upon the Possession of the Lessee, and with their Consent enfeoffs the Plaintiff (Feme Sole) as Assignee.

Hill. 22 Car. 2. Roll 1667. B. C.

Warwick. } *H. J.* late of, &c. was summoned to wit. } *H. J.* late of, &c. was summoned to answer *T. R.* and *Anne* his Wife, Assignees of *E. M. Gent* of a Plea, that he keep to them a Covenant between the aforesaid *E.* and the aforesaid *H. J.* made according to the Force, Form, and Effect of certain Indentures thereof between them made: And whereupon they the said *T. R.* and *A.* by, &c. their Attorney say, that whereas the aforesaid *E.* was seised of Twenty Acres of Pasture with the Appurtenances in *X.* in the County aforesaid, in his Demesne as of Fee, and being so thereof seised, the said *E.* (such a Day and Year) at *X.* aforesaid, by his certain Indenture between the said *E.* by the Name of *E. M. of, &c.* of the one Part, and the aforesaid *H. J.* by the Name of, &c. of the other Part made, one Part whereof sealed with the Seal of the aforesaid (the Defendant) the said *T. R.* and *A.* here shew forth in Court, the Date of which is on the same Day and Year, had demised, granted, and to Farm let, and by the said Indenture did demise, grant, and to Farm let to the aforesaid *H. J.* the Tenements aforesaid with the Appurtenances, by the Name of all those his several Pieces or Parcels of Pasture, (so recite the Deed and Covenants, and the Covenant to repair) as follows: And the aforesaid *H. J.* for himself, his Executors,

H h 3

tors, Administrators and Assigns, *Had* covenanted and agreed to and with the aforesaid *E. M.* his Heirs and Assigns, by the Indenture aforesaid, in Manner and Form following; to wit, That he the said *H. J.* his Executors, Administrators and Assigns, from Time to Time, and at all Times, during the said Lease, at the Costs and Charges of them, or some of them, would maintain, repair, and keep the Hedges, Ditches, Bridges, Gates, Roads, Fences, Pales, and Inclosures belonging to the said Premises, in and by all needful and necessary Repairs, when Necessity should require, and every Part thereof sufficiently repaired, maintained, and kept as they received the same, at the End, Expiration, or other Determination of the aforesaid Demise to the said *E. M.* his Heirs or Assigns, quietly and peaceably should surrender and yield up, as by the said Indenture, amongst other Things, more fully appears, by Virtue of which Demise the aforesaid *H. J.* into the Tenements aforesaid, with the Appurtenances, except as before excepted, Enter should was thereto possessed; and the said *J. M.* being so thereof possessed, and the aforesaid *E. M.* being seised of the Reversion of the Tenements aforesaid, with the Appurtenances, in his Demise as of Fee, the said *E. M.* afterwards, to wit, (such a Day and Year) into the Tenements aforesaid, with the Appurtenances, upon the Possession of the said *H. J.* thereof entered, and of the same Tenements, with the Appurtenances, with the Assent and Consent of the aforesaid *A. J.* then possessed the aforesaid *Anne*, whilst she was sole; To have and to hold to the said *Anne*, her Heirs and Assigns for ever; by Virtue of which Feoffment the said *Anne*, whilst she was sole, was seised of the

the Tenements aforesaid, with the Appurtenances in her Demesne as of Fee; the the said *Anne* being so thereof possessed, the aforesaid *H. J.* into the Tenements aforesaid, claiming his Term aforesaid thereof enter'd, and was thereof possessed for the Residue of the Term aforesaid; and being so thereof possessed, and also the said *Anne* being seised of the Reversion of all the Tenements aforesaid, with the Appurtenances in her Demesne as of Fee; the the said *Anne* afterwards, to wit, (such a Day and Year) at *X.* aforesaid, took to Husband the aforesaid *T.* by which the said *T.* and *A.* were, during the Residue of the aforesaid Term of ten Years, seised of the Reversion of the Tenements aforesaid, with the Appurtenances in their Demesne as of Fee, in Right of the said *A.* until and to the End of the Term aforesaid, and thenceforth always afterwards to this Time, the said *T.* and *A.* were and are seised of the Tenements aforesaid, with the Appurtenances in their Demesne as of Fee, in Right of the said *A.* And the said *T.* and *A.* further say, That at the aforesaid Time of making the said Indenture, and also at the Time of the first Entry of the aforesaid *H. J.* into the Tenements aforesaid, with the Appurtenances; by Virtue of the Demise aforesaid, all and singular the Hedges, Ditches, Bridges, Gates, Ponds, Fences, Pales, and Inclosures belonging to the Tenements aforesaid, with their Appurtenances demised as abovesaid, were well and sufficiently repaired; and that after the Making of the Indenture aforesaid, and after the Solemnization of the Marriage between them the said *T.* and *A.* and before the Day of the Swearing of the original Writ of the said *T.* and *A.* and also before the End of the Term aforesaid; to wit,

H b 4

(such

(such a Day and Year) and from the same twentieth Day, &c. until and to the End of the Term aforesaid, the aforesaid Hedges, to wit, a Thousand Perches of Hedges, every Perch thereof of the Price of 2 s. and the Gates, to wit, twenty Gates, every Gate thereof of the Price of 10 s. and the Pales, to wit, a Thousand Pales, every Pale thereof of the Price of 4 d. belonging to the Tenements aforesaid, with the Appurtenances demised as above-said, were broken, torn down, prostrated, and in great Decay, for Default of Repair thereof; and that the Hedges, Gates, and Pales so being broken, torn down, and prostrated by the aforesaid *H. J.* at the End of the Term aforesaid, to the said *T.* and *A.* were left not repaired, contrary to the Form and Effect of the Indenture aforesaid: And nevertheless the aforesaid *H. J.* though often requested, the aforesaid Hedges, Gates, and Pales hath not taken Care to repair; and so the said *T.* and *A.* say, that the said *H. J.* his Covenant, that he the said *H. J.* his Executors, Administrators and Assigns, from Time to Time, and at all Times, during the said Lease, at the proper Costs and Charges of them, or some of them, would maintain, repair, and keep the Hedges, &c. in and by all needful and necessary Repairs, when Necessity should require; and the same, and every Part thereof so sufficiently repaired, maintained, and kept as they received the same, at the End, Expiration, or other Determination of the Lease aforesaid, to the aforesaid *E. M.* his Heirs or Assigns, should quietly and peaceably leave and surrender to the said *T.* and *A.* have not kept, but have broke the same, and hitherto, &c. Whereupon they say that they are the worse, and are damaged to the Value of, &c.

Count

Count for an Administrator de bonis non Administrat' by his Wife, against two Executors.

H. G. and Anne his Wife Executrix of the Last Will and Testament of A. C. late of, &c. and Isabella, a Co-executrix of the said Testament, were summon'd to answer to T. H. Administrator of the Goods and Chattels which belonged to J. R. not administer'd by Judith R. Administratrix of the Goods and Chattels which belong'd to the aforesaid J. who died intestate, of a Plea that they render to him 30 l. which they unjustly detain from him; and whereupon the said T. by, &c. his Attorney says, that whereas the aforesaid A. C. in his Life-time, (at a Day, Place and Year), by his certain Writing obligatory, &c. acknowledg'd himself to be bound to the aforesaid J. in his Life-time, in the aforesaid 30 l. to be paid to the said J. when he should be thereunto required: Nevertheless the aforesaid A. C. in his Life-time, or the said Anne and Isabel, after the Death of the said A. while the said Anne was Sole, and also the said H. and Anne and Isabel, after the Marriage between the same H. and Anne celebrated, although often requested, the aforesaid 30 l. to the aforesaid J. in his Life-time, or to the said T. and Judith, in the Life-time of the said Judith, after the Death of the said John, or to the said T. after the Death of the said Judith, to whom Administration of all the Goods and Chattels which belong'd to the aforesaid John at the Time of his Death aforesaid, not administer'd by the aforesaid Judith, Administratrix of the Goods and Chattels which belong'd to the aforesaid John, was committed such a Day and Year at G. after the Death of the

the said *Judith*, have not render'd, but have refus'd to render the same to them; and the aforesaid *H.* and *Anne* and *Isabel* hitherto refuse to render the same to the said *Thomas*, and unjustly detain the same; whereupon he says that he is the worse, &c.

Otherwise.

J. W. and *E.* his Wife, Administratrix of all and singular the Goods and Chattels, Rights and Credits which belong'd to *R. F.* at the Time of his Death, by *S. F.* late Executrix of the Testament of the aforesaid *R.* not administer'd, complain of *R. B.* late of *L.* Esq; otherwise call'd *R. B.* of the Inner Temple, London, Gent, in the Custody of the Marshal, &c. of a Plea, that he render to them 100 *l.* of good and lawful Money of Great Britain, which he unjustly detains from them; for that, to wit, that whereas the aforesaid *R. B.* (such a Day and Year) at *L.* aforesaid, to wit, in the Parish of *St. Mary le Bow*, in the Ward of *Cheap*, by his certain Writing obligatory, sealed with the Seal of the said *R.* and now shew'd to the Court of our said Lord the King, the Date whereof is on the same Day and Year, acknowledg'd himself to be held and firmly bound to the aforesaid *R. F.* in his Life-time in the aforesaid 100 *l.* to be paid to the said *R. F.* when he should be thereunto required: Nevertheless the aforesaid *R. B.* though requested, &c. the aforesaid 100 *l.* to the aforesaid *R.* in his Life-time, or to the aforesaid *S.* in her Life time, after the Death of the aforesaid *R. F.* or to the said *E.* after the Death of the aforesaid *S.* whilst she was sole; to which said *E.* Administration of all and singular the Goods and

and Chattels, Rights and Credits which belonged to the aforesaid R. in his Life-time, by S. F. late Executrix of the aforesaid Testament of the said R. not administer'd, with the Testament of the aforesaid R. annex'd by after the Death of the said S. to wit, (such a Day and Year) at L. aforesaid, in the Parish and Ward aforesaid, was duly committed, or the said J. and E. after the Marriage between them celebrated, or either of them, hath not paid but the same to the aforesaid R. F. in his Life-time, and to the aforesaid E. after the Death of him R. F. whilst she was sole; and also to the said J. and E. after the Intermarriage between them celebrated, and to either of them to pay hath utterly refused, and the same yet do refuse to pay to the said J. and E. and unjustly detain the same in Delay of Administration of the Goods and Chattels aforesaid, and to the Damage of them the said J. and E. of 40*l*. and thereupon they bring Suit, &c. and the said J. and E. bring here into the Court of our said Lord the now King, the Letters of Administration, &c.

Indebitatus Assumpsit by Husband and Wife for Money lent the Defendant by the Wife while she was sole.

C. B. and H. his Wife, complain of J. L. in the Custody of the Marshal, &c. for that, to wit, that the aforesaid J. L. (such a Day and Year) at L. in the County aforesaid, was indebted to the aforesaid H. while she was sole, in 10*l*. of lawful Money, &c. for divers Sums of Money by the aforesaid H. whilst she was sole, to the aforesaid (the Defendant) upon the Request of the said (the Defendant) before that

that Time lent; and he the aforesaid *J. L.* being so indebted to the said *H.* he the said *J.* in Consideration thereof, afterwards, to wit, the same Day and Year aforesaid, at *L.* aforesaid, in the County aforesaid, undertook to the same *H.* whilst she was sole, and then and there faithfully promised, that he the said *J. L.* the said 16*l.* to the same *H.* when he should be thereunto requir'd, would well and truly pay and content; and whereas, also the aforesaid *H.* whilst she was sole, to wit, the same first Day of *April*, the Day and Year aforesaid, at *L.* aforesaid, in the County aforesaid, at the special Instance and Request of the aforesaid *J. L.* had lent and accommodated to the same *J. L.* 20*l.* of like lawful Money, the aforesaid (the Defendant) in Consideration thereof, afterwards, to wit, (the same Day and Year aforesaid) at *L.* aforesaid, in the County aforesaid, to the aforesaid *H.* whilst she was sole, undertook, and then and there faithfully promised, that he the said *J. L.* the aforesaid 20*l.* to the same *H.* when afterwards he should be thereunto likewise required, would well and faithfully pay and content: Nevertheless the said *J. L.* his several Promises and Undertakings aforesaid, to the aforesaid *H.* whilst she was Sole in Form aforesaid made, not regarding, but contriving and fraudulently intending the aforesaid *H.* whilst she was sole, and the aforesaid *C.* and *H.* after the Marriage between them celebrated, in this Part, craftily and subreily to deceive and defraud, the aforesaid several Sums of Money, in the Whole amounting to, &c. to the aforesaid *H.* whilst she was sole, or to the same *C.* and *H.* after the Marriage between them celebrated, or to either of them, hath not paid, according to the several Promises

aises and Undertakings of him the said (the Defendant), nor them, or either of them hath hitherto thereof in any sort contented; altho' to do this the aforesaid *J. L.* by the aforesaid *H.* whilst she was sole; and by the aforesaid *C.* and *H.* after the Marriage between them celebrated, to wit, (such a Day and Year) at *L.* in the County aforesaid, hath been requested; but the aforesaid Pounds to them *C.* and *H.* or either of them to pay, hath hitherto utterly refused, and still doth refuse; whereupon the same *C.* and *H.* say, that they are the worse, and have Damage to the Value, &c. and thereupon, &c.

The Defendant in Ejectment pleads Coverture.

(The Defendant) comes and prays Judgment of the Writ aforesaid, because she says that she the same (the Defendant) on the Day of the suing out of the original Writ of them (the Plaintiffs) was Covert of one *A. B.* her Husband, to wit, at *S.* aforesaid; and this she is ready, &c. Whereupon, because the aforesaid *A.* is not named in the Writ aforesaid, the same (the Defendants) pray Judgment of the said Writ, &c.

A Replication

Ought not to be quash'd, because he says that the aforesaid (the Defendants) the Day of suing out of the original Writ of the said (the Plaintiff) to wit, such a Day at *S.* aforesaid, was sole; without that, that the aforesaid (the Defendant) the Day of suing out the original Writ of the said (the Plaintiff) was Covert of *A. B.* her Husband, as the aforesaid (the Defendant)

endant) hath above alledged; and this, &c. Whereupon, because the aforesaid (the Defendant) the Trespass and Ejectment aforesaid hath above confess'd, the said (the Plaintiff) prays Judgment, and the Possession of his Term aforesaid, with his Damages, &c. to be adjudg'd to him.

And the aforesaid (the Defendant) as before, says, on the said Day of suing out the original Writ of the said Plaintiff, he was Covert of the aforesaid A. B. her Husband, as the said Defendant hath above alledg'd; and this, &c.

Covert Baron pleaded after the Original purchased.

And the aforesaid (the Defendant) in his proper Person, comes and prays Judgment of the Writ aforesaid, &c. because he says, that the aforesaid (the Plaintiff) after she brought her Writ aforesaid against the same (the Defendant) to wit, (such a Day and Year) at E. aforesaid, took to Husband one J. C. yet living, and in full Life being, to wit, at E. aforesaid, and so the aforesaid (the Plaintiff) is now Covert of an Husband; and this, &c. Whereupon he prays Judgment of the said Writ, &c.

Ought not to be quashed, because she says, that she, on the Day of suing out the original Writ aforesaid, and always afterwards, was Sole, and not Covert of the aforesaid A. B. as the aforesaid (the Defendant) hath above alledged; and she prays that this may be inquired by the Country.

That the Plaintiff took Husband after the last Continuance.

He says, that after the last Continuance of the Plea aforesaid, to wit, after (such a Return) last past, from which Day the Plea aforesaid was last continued here until this Day, to wit, on the *Octave* of *St. Hillary*; and before this Day, to wit, (the Day and Year, &c.) at *A.* aforesaid, the said (the Plaintiff) took to Husband one *A. B.* which said *A.* is still living, and in full Life, to wit, at *A.* aforesaid; and this, &c. whereupon, &c.

Ought not to be quashed, because she says, that after the aforesaid (such a Return) and before the aforesaid *Octave* of *Hillary*, she (the Plaintiff) did not take the aforesaid *A.* her Husband, as the aforesaid Plaintiff hath alledged. And this, &c.

Otherwise.

The Defendant pleads Covert of Baron.

The Action lies not, because she says that she the said *D.* at the Time of the Exhibiting the Bill aforesaid, was Covert of one *S.* then her Husband; which *S.* at *C.* in the County of *Warwick*, is yet living, and in full Life, and which said *S.* is not named in the Bill aforesaid: Whereupon she prays Judgment, if, &c.

Ought not to be precluded, because he says, that she the said *D.* the Day of exhibiting the Bill aforesaid, to wit, (such a Day and Year) was sole; without that, that she the same Day, or ever afterwards, was Covert of the aforesaid

said S. as she () hath above alledged. And this, &c.

And the aforesaid D. says, that she () at the Time of exhibiting the Bill aforesaid, was Covert of the aforesaid S. at that Time her Husband, as she hath above alledged. And this, &c.

Never joined in lawful Marriage.

The Action lies not, because he says that the said (the Plaintiff) never was to the said R. in lawful Matrimony joined; and this he is ready to verify when and where, and as the Court here shall consider, &c. Whereupon he prays Judgment, &c.

Ought not to be precluded, because she says that she () at S. in the County of *Warwick*, in the Diocese of C. and L. to the aforesaid R. in lawful Marriage was joined; and this she is ready to verify when and where, &c. and in such Manner as the Court of the King here shall consider, and because the Conusance of such Case belongs to the Ecclesiastical Court; therefore it is commanded to the Bishop of L. and C. the Diocesan of the Place aforesaid, that those Persons being convened before him, who ought to be convened in this Part, he may inquire diligently the Truth of the Matter upon the Premises; and what shall be thereupon inquired, he make appear here on the Morrow of *All Souls* by his Letters Patent and Close; the same Day is given to the Parties aforesaid there, &c.

Of the Writ, because Marriage was not solemnized between the Plaintiff and his Wife the Day of suing the Writ.

P. G. &c. was summoned to answer R. R. Gent. and A. his Wife, Executrix of the Testament of W. G. Gent. of a Plea, that he render to them 20 l. which he unjustly detains from them.

And the aforesaid F. by A. B. his Attorney, comes and prays Judgment of the Writ aforesaid, because he says that a Marriage on the Day of suing of the original Writ of the aforesaid R. and A. between them, according to the Ecclesiastical Law of England, was not solemnized: And this he is ready, &c.

Ought not to be quashed, because they say that a Marriage between them the said R. and A. long before the Suing out of the original Writ of them the said R. and A. to wit, on the 20th Day of June in the first Year of the Reign of the Lord the King that now is, according to the Ecclesiastical Law of England, was solemnized, to wit, at B. aforesaid: And this they pray, &c.

Debt against an Executrix and her Husband for Rent arrear on a Lease made to the former Husband.

AND whereupon the same R. B. by J. S. his Attorney, says, that whereas he (such a Day and Year) at, &c. by his certain Indenture between him R. B. of the one Part, and the aforesaid J. in his Life-time, of the other Part; one Part whereof, sealed, &c. demised to the aforesaid J. in his Life-time all that, &c.

To have, &c. rendring, &c. by equal Portions to be paid, by Virtue of which Demise, the aforesaid J. in his Life-time, into the Tenements aforesaid, with the Appurtenances above demised, enter'd, and was thereof possessed; and being so thereof possessed, on such a Day and Year at H. aforesaid made his Testament; and the aforesaid M. constituted his Executrix of his said Testament; and afterwards, to wit, on the same Day and Year, at J. aforesaid, died of the Tenements aforesaid, in Form aforesaid possessed; after whose Death, the aforesaid M. the Burthen of the Execution of the aforesaid Testament took upon herself, and into the Tenements aforesaid, with the Appurtenances, enter'd, and was thereof possessed; and being so thereof possessed at J. aforesaid, took to Husband the aforesaid M. N. and the aforesaid 100 l. of Rent aforesaid, for one whole Year ending (at such a Feast), and by the Space of 14 Days next after the same Feast to the same R. after the Death of the aforesaid J. were in Arrear, and yet are unpaid, by which the Action accrued, &c.

Debt by Husband and Wife, Administratrix of the Obligee, against the Heir of the Obligor.

T. S. late of London, Esq; Son and Heir of T. C. S. late of the same, &c. was summoned to answer J. H. and Jane his Wife, Administratrix of the Goods and Chattels that belonged to T. C. Gent. who died intestate, &c. of a Plea, that he render to them 100 l. which he unjustly detains from them, &c. and whereupon they the same J. and J. by J. S. their Attorney say, that whereas the aforesaid C. Father of T. S. whose Heir he is, in his Life-time, on the

second

second Day of *March* in the Year, &c. at *London*, in the Parish, &c. in the Ward, &c. by his certain Writing obligatory had acknowledged himself to be bound to the aforesaid *T. C.* in his Life-time, in the said 100 *l.* to be paid to the same *T. C.* when thereto he should be required; and to the same Payment well and faithfully to be made, the aforesaid *C.* had bound himself and his Heirs by the same Writing: Nevertheless the aforesaid *C.* in his Life, and the aforesaid *T. S.* the Son and Heir of him the said *C.* after the Death of him the said *C.* although often requested the said 100 *l.* to the aforesaid *T. C.* in his Life, or to the same *J.* after the Death of him the said *T.* whilst she was sole, to whom Administration of all the Goods and Chattels which belonged to the same *T.* at the Time of his Death, by *W. D.* Doctor of Laws of the Prerogative Court of *Canterbury*, Master Keeper or Commissary lawfully constituted there (on such a Day, &c. and Year, &c.) at *London*, in the Parish and Ward aforesaid, was committed, or to the same *J.* and *J.* after the Marriage between them celebrated, have not render'd, but the same to them to render have denied; and the aforesaid *T. S.* the same to render to the said *J.* and *J.* denies, and unjustly detains: Whereupon they say that they are the worse, and have Damage to the Value, &c. and thereupon they bring their Suit, and they shew forth here in Court as well the Writing aforesaid, by which the Debt aforesaid, in Form aforesaid is witnessed; the Date whereof is on the said second Day of *March* in the Year, &c. as the Letters of Administration aforesaid, &c.

*Debt for Rent upon a Lease for Years, against
Husband and Wife, Executrix of the Lessee.*

A. B. Esq; complains of *J. W.* and *E.* his Wife, Executrix of the Testament and Last Will of *R. M.* of a Plea, that they render to him 30*l.* which they unjustly detain, &c. for that, to wit, that whereas the same *A. B.* (on the Day, &c.) by a certain Indenture between him *A.* of the one Part, and the aforesaid *R. M.* in his Life-time, of the other Part, made, one Part whereof sealed with the Seal of the aforesaid *R. M.* the said *A. B.* shews forth here in Court, the Date whereof is on the same Day and Year, had demised, granted, and to Farm let to the said *R. M.* all that Messuage, &c. to have and occupy the said Messuage; and all other the Premises by the Indenture aforesaid demised, and every Part of the same, to the said *R. M.* his Executors, Administrators and Assigns, &c. from the Feast, &c. then next ensuing the Date of the said Indenture aforesaid, until the full End and Term, &c. Thenceforth, &c. if the same *A. B.* and *E.* then his Wife, and *J.* his Son, or either of them should so long live, rendring (as by the Lease) as by the same Indenture, amongst other Things, more plainly appears; by Virtue of which Demise, the aforesaid *R. M.* on the Morrow of the aforesaid Feast, &c. next after the Date of the Indenture aforesaid, into the Messuage aforesaid, with the Appurtenances, enter'd and was thereof possessed; and being so thereof possessed, the same *R. M.* afterwards, to wit, on the Day, &c. made his last Will and Testament in Writing; and by the same his Last Will did constitute and ordain the aforesaid *E.* Executrix

trix of his Testament aforesaid ; and afterwards, to wit, the Day, &c. and Year, &c. at, &c. died of the Messuage aforesaid, with the Appurtenances so as aforesaid possessed ; after whose Death the aforesaid E. the Testament aforesaid proved in due Form of Law, and took upon herself the Burthen of the Execution of the Testament aforesaid ; and as Executrix of the Testament aforesaid, into the Messuage aforesaid, with the Appurtenances, enter'd and was thereof possessed, by Reason of the Execution of the Testament aforesaid ; and being so thereof possessed, the same E. afterwards, to wit, (such a Day and Year) at, &c. took to Husband the aforesaid J. W. by Virtue of which the said J. E. in Right of the said E. were, and yet are of the Messuage aforesaid, with the Appurtenances possessed, by reason of the Execution of the Testament aforesaid, &c. and 30 l. of the Rent aforesaid, for one whole Year ending at the Feast, &c. last past, after the Death of the aforesaid R. M. to the said A. B. were in arrear, and yet are unpaid, by which the Action hath accrued, &c.

T H E T A B L E.

A.

Abatement.

O F a Writ or Suit in Law or Equity by Marriage or Death, pending the Suit	Page
	309, 310, 311, 312
The Wife is put in before the Husband, it abates the Writ	312
Feme Sole Plaintiff, depending a Bill in Chancery, takes Husband, it abates the Writ; how if she were Defendant	312, 313

Acceptance.

What Things the Wife may make good after the Death of her Husband by Acceptance	78
Acceptance of a Conditional Estate for a Jointure, a good Bar of Dower	153
Remitter by Acceptance	201
Acceptance of Rent after the Husband's Death, affirms his Feoffment of the Wife's Land	248
What Acceptance of the Husband shall affirm a voidable Lease	247
By Acceptance of Rent a Feoffment affirmed	ib.

Aug.

The TABLE

Ass.

What Acts, Charges or Forfeitures of the Husband shall charge the Wife after his Death

Page 74, 75

What Acts done by the Baron and Feme shall be construed as Acts of the Wife, or not, so as to bind her after the Death of the Husband 77

For what Acts or Torts of the Wife the Husband shall be punished, and *contra* 78

What Acts done, or Contracts made by the Wife, shall bind the Husband 274, &c.

With or for what Acts of the Wife the Husband shall be chargeable or not 289

Actions.

What Things or Actions the Wife shall have after the Death of the Husband 80

What Actions real, what Actions personal 81, 85

Actions brought by Baron and Feme as Executrix or Administratrix 294

Actions which the Husband may have for Wrongs done to the Wife 314

Joinder in Action. *Vide Title Joinder.*

Diversity between Actions which affirm Property, and which disaffirm Property 319

Actions brought by a Feme Covert without her Husband 354

Chose in Action 64, 293

Account.

Account alters not the Action of *Indebit^a Assumpsit* 324

Account brought against Baron and Feme 384

The TABLE

Administratrix. Vide Executrix.

If a Feme Covert die intestate, in what Cases
Administration may be granted of her Goods

Page 292

What Things the Administratrix of the Wife shall
have, and not the Husband

293

Where the Husband shall be charged with the
Waste of the Wife Administratrix; the Man-
ner of the Proceedings of the Sheriff in such
Case

299

Of Action brought by Baron and Feme as Exe-
cutrix or Administratrix

305, &c.

Where and how Administration belongs to the
Husband or Wife

308

Adultery.

Actions against an Adulterer

322

Adulterer kill'd in the Act

323

Agreement. Disagreement.

What Agreement between the Husband and
Wife shall stand good, or be extinguished by
the Marriage

53

For what Things during the Coverture the Wife
shall be charged after the Death of the Hus-
band, by her Agreement or Disagreement

247

Alteration.

Alteration of the Property of Goods, how and
by what Act

262, &c.

Appeal.

The F A B L E.

Appeal.

Appeal brought by a Woman	Page 360
None but a Wife <i>de jure</i> shall have an Appeal	<i>ibid.</i>
Appeal is annexed to the Widowhood	361
It must be brought within the Year and Day	<i>ibid.</i>
Process in Appeal	<i>ibid.</i>
Pleadings or Bars in Appeal	362
Trials in Appeal	364
In what Cases the Husband shall be compelled to appear and put in Bail for his Wife, or to remain in Prison	392

Assignment.

Assignment of Estate, and Assignment of Contract	124
Assignment of Dower	128
Assignment of Rent out of Land pleaded in Dower	134
Where the Husband shall be Assignee to the Wife	60

Assent.

What is a good Assent or Claim as Executrix, and not as Legatee	295
Assent of a Feme Covert to a Legacy	239

Assets.

Term extinct in one Respect, yet remains <i>Assets</i> in another Respect.	266, 267
--	----------

Assise.

The TABLE.

Affise.

In Affise Baron and Feme must join on Disseisin of the Wife's Land	Page 326
<i>Quampsit. Vide</i> Action on the Case, Tit. Case, and	343, &c.
Covenant for further Assurance	330

Attainder.

Where the Wife shall lose her Dower by the Attainder of her Husband	114, 137
By Attainder or Outlawry of the Husband, the Wife's Term is a Gift in Law	271, 273

Attachment.

Attachment of the Husband, if the Wife appear not on a <i>Subpœna</i>	398
--	-----

Attornment.

What Act of the Husband or Wife shall amount to an Attornment	51, 191, 213
--	--------------

Attorney.

In what Cases made by a Wife	399
<i>Audita Querela</i> against Baron and Feme	385

Avowry.

In Avowry for Rent Baron and Feme must join	328
Avowry for Rent out of the Wife's Land, in whose Name it ought to be	192, &c.
Where the Husband may avow sole, <i>vide</i> Rent. <i>Quer.</i>	

The TABLE

Averment.

Averment of a Life	Page 404
Averment that she is a Feme Covert	405
Marriage averr'd	414

Award,

How and wherein the Wife shall be bound by her Husband's Submission to an Award	76
<i>Vide</i>	301

B.

Baron and Feme.

W HAT Acts the Husband may do to the Wife, and the Wife to the Husband, though they are one Person in Law	8
Who shall be said to be Baron and Feme	32
What Things and Actions the Wife shall have after the Death of the Husband; & <i>vice</i> <i>versa</i>	80, &c. 86, &c.
What Things the Wife may make good after the Death of the Baron	91
Where Baron and Feme shall take by Intireties, or by Moieties	209
Where the Wife's Grant is void when she joins with her Husband, and where not	219
How a Man may execute an Estate to his Wife	222
For what Torts of the Wife he shall be punished	78
What amounts to a Disposition of the Wife's Term by the Husband, so as to vest the In- terest in him, his Executors or Administrators	262
What	

The TABLE.

What Power the Husband hath over the Wife's Term. <i>Vide</i> Term. What Acts of the Husband shall bind the Wife	Page 76
Where the Husband shall be punished for Torts done by the Wife	289, 299
Of Actions the Husband may have for Wrongs done to the Wife	314, &c.
In what Actions the Husband shall be charged after the Death of the Wife	388
In what Cases the Husband shall be compelled to put in Bail for his Wife	392
In mean Process, if the Wife be taken before the Husband, she shall be discharged; not so in Case of Execution	395

Bastard.

Who shall be said to be a Bastard or not	16, 17
Bastard, in what Court to be proved	18
General } Bastardy, where triable	19
Special }	
Bastard by the Common Law, and <i>Mulier</i> by the Civil Law	20
Bastard by the Spiritual Law, and <i>Mulier</i> by our Law	<i>ibid.</i>
Bastardy, where triable	21
Of Bastard <i>Eigne</i> and <i>Mulier puisne</i> in Case of Descent	24
How Estates may be limited to a Bastard by a reputed Name, or not	25
Who only may write to the Bishop to certify Bastardy	22, &c.
Of the Bishop's Certificate to prove Marriage	43, &c.

Case.

The TABLE

C.

Case.

ACTIONS on the Case on *Assumpsits*, &c. *Page 343, &c.*

Action on the Case for scandalous Words spoken against Baron and Feme by Baron and Feme, and what Judgment must be *366, &c.*

Action on the Case lies not against a Feme Covert for negligent keeping of Fire *382*

Feme Covert affirming herself to be a Feme Sole to entice another to Marriage, Action on the Case lies not *382*

Case for Battery of the Wife. *337 to 341*

Charge.

What Acts, Charges, or Forfeitures of the Husband shall bind the Wife after his Death *70, 75*

How the Husband may charge the Land of the Wife by Rent, Statute, Judgment, &c. *70, &c.*

Where the Baron and Feme shall join in Challenge *420*

Chattels.

Chattels Real, Mixt, Personal; and what Estate the Baron gains in them by the Intermarriage of his Wife *62, 63*

Choses in Action, what Estates the Baron gains in them by his Intermarriage *293*

Com.

The T A B L E.

Commissioners.

Commissioners taking a Fine of a Feme Covert,
and how their Irregularity punished Page
170, 181

Common. Vide 342.

Prescription for Common *in jure Uxoris* 349
Conclusion of Pleas 380, 420

Conditions.

What Conditions in Law shall bind the Wife or
not 30
Conditions Subsequent and not Precedent 255
What Contracts made by the Wife shall charge
the Husband, or not 274, &c.

Copyhold.

Copyhold suspended by Intermarriage with the
Tenant 52
If a Surrender is a Discontinuance 199
What Acts of the Husband shall destroy or for-
feit the Custom of the Wife's Copyhold E-
state, or the Estate or not 248
Feme Copyholder who had a Widow's Estate
shall not avoid a Lease made by her Husband
249
A Woman that holds *durante viduitate* by Cu-
stom, may make a Lease before Admittance
251
Surrenders, Grants of Copyhold Estate by Ba-
ron and Feme, and the Construction 251
The

The T A B L E.

The Wife to join with the Husband in the
Grants of Copyholds Page 251

Covenant.

Covenant for further Assurance on Request by
two Femmes, and one dies before Request 331
Feme Covert by Warranty in a Fine *sur Concessit*
is bound in an Action of Covenant 175
Covenant where to be brought by Baron and
Feme 325, 330
Covenants in a Deed of Separation between Ba-
ron and Feme, and for allowing yearly Main-
tenance ; and Pleadings 257, &c.

Costs. Vide Damages.

Coverture.

Of delivering Goods to a Feme Covert not
knowing her to be so 285
Coverture, not to be determined by Affidavit
424
Of Pleading Coverture 408, 409

Courtesie.

Tenant by Courtesie 93
The Nature of this Estate *ibid.*
Of what Estate a Man shall be Tenant by the
Courtesie or not *ibid.*
If one shall be Tenant by the Courtesie of an
Estate in Suspence or not 93
In what Case the Husband shall be Tenant by
the Courtesie where the Wife's Estate is de-
feasible by Condition 95
Four Things belong to the Estate of Tenant
by the Courtesie 96
What

The T A B L E.

What Seisin of the Wife it must be that makes
the Husband Tenant by the Courtesie *Page*
96.

How a Man shall be Tenant by the Courtesie
in respect of Issue, and how he must plead
the having of Issue 98

Custom.

Customs of Manors as to Wives, Widows, &c: what are good, and what not	251, 252
Custom of <i>London</i> as to Goods, how the Wife may dispose of them	145, &c.
Customs as to Lands	190, 219
<i>Rationabili parte honorum</i> , according to the Custom of <i>London</i>	145, &c.
Custom of a Feme Sole Merchant	356, 357
<i>Cui in vita</i> brought by a Woman	359

D.

Damages.

D Amages in Dower	141
Where the Husband shall recover Da- mages Sole	427, 428
Judgment that the Baron and Feme shall reco- ver Damages	<i>ibid.</i>

Death.

Death after Verdict and before the Day in Bank, it abates the Writ	311
---	-----

Debt.

Debt suspended, &c.	296, 298
2	Where

The T A B L E.

Where Debt for Rent to be brought by Baron or Feme, or both	Page 241, &c.
Of Baron and Feme's joining in Debt on Bond	334
Debt against Baron and Feme, how to be brought	377
Where Baron and Feme shall join in <i>Detinue</i>	352

Declarations.

Of Declarations and Pleadings by or against Baron and Feme, <i>vide</i>	347, 348
Declarations of Uses on a Fine	184
Declarations as to Wares taken up by the Wife	286
Declarations on <i>Devastavit</i> against Baron and Feme Executrix	351
Debt by Baron and Feme on Bond made to the Wife <i>dum sola</i> , how to declare	336
Declaration in Trespass and Battery by Baron and Feme	357
Declaration in Action against Baron and Feme for scandalous Words	366
In Declaration he saith Baron and Feme were seised, and shews not how the Estate began; and he need not, being but a Conveyance to an Action on the Case	404
Prescription alledged in Baron and Feme	<i>ibid.</i>
Averment of a Life	<i>ibid.</i>
Averment that she is a Feme Covert	405

Deed.

What shall be said to be the Deed of the Ba- ron and Feme	215
One Deed cannot enure from one by way of Interest, and from another by way of Estop- pel	332

The T A B L E.

Descent.

Where a *Descent* cast during the Coverture shall toll the Entry of the Wife, and where not
Page 199

Disseisin.

Where and to what purpose a Feme Covert shall be said a *Disseisorefs* without her proper A& of Entry, and where not 194 *Vide* 200
Feme Covert cannot make a *Disseisin* to the Use of the Husband 194

Default.

Where the *Default* of the Wife shall be the Default of the Husband 389
Where the Wife shall be received on the Husband's *Default*, and *econtra* 390

Discontinuance.

What A& of the Husband was a Discontinuance of the Wife's Land at Common Law 195
Stat. 32 *H. 8. c. 28.* explained as to Discontinuance; in what Cases the Wife may enter after the Discontinuance of the Husband 195, &c.
Discontinuance, what 196, &c.
Discontinuance or no by the Agreement of the Wife 197

Divorce.

The T A B L E

Divorce.

The Nature of it, and what are good Causes of Divorce	Page 429
The several Kinds of Divorce	430
What Divorces declare the Marriage void <i>ab initio</i>	431
Of the Divorces <i>causa Pracontractus, Frigiditatis, Affinitatis, Savitiæ</i> , which dissolve the Marriage <i>a vinculo</i>	<i>ibid.</i>
The Consequence of a Divorce <i>a Mensa & Thoro</i>	433
Divorce pleaded	415
By Divorce <i>causa Pracontractus</i> the first Baron and Feme are compleat Baron and Feme without other Solemnity	430, 431
If the Parties divorced <i>causa impotentia</i> intermarry others, and have Issue, whether the Issue are Bastards	432, 434
What's a good Ground to sue a Divorce <i>causa Savitia</i>	435
What Acts done by the Husband shall stand good notwithstanding the Divorce	<i>ibid.</i>
Of Suits or Actions after Divorce	437
Where and in what Cases notwithstanding a Divorce, the Wife shall be endowed or not	437
What Divorce shall bastardize the Issue or not	438

Dower.

The Nature of it	101
Qualifications of the Wife to enable her to Dower	<i>ibid.</i>

The T A B L E.

Of the Endowment of a Wife <i>de facto</i> and <i>de jure</i>	Page 101
What Seisin the Husband must have to make the Wife dowable,	103, 104
Of what Seisin of the Husband the Wife shall be endowed	<i>ibid.</i>
How she shall be endowed of an intire Inheritance	104, 106
How she shall be endowed of improved Lands	108
Of what Estate the Wife shall not be endowed	109
How she shall be endowed of Lands in Mortgage	110, 111
For and in respect of what Disability a Woman shall not be endowed	114, 137
Where the Wife shall lose her Dower by the Attainder of her Husband, or not	<i>ibid.</i>
What Acts of the Wife shall bar her of her Dower	117
What Persons may assign Dower, or not	120, 124
What Assignment of Dower against Common Right	125
What Things may be assigned in lieu of Dower	126
Endowment by Meets and Bounds	<i>ibid.</i>
Assignment of Dower how to be made	128
The Writ and Declaration in Dower and Pleadings	132, 133
What Pleas are good or not in Bar of Dower	133
What Divorce is a good Bar of Dower	431
Judgment and Execution in Dower	135, 141

Debaſſabit

The T A B L E;

Devastavit.

Baron and Feme committed to the Fleet on Devastavit. Page 300

The Husband charged with a Devastavit of the Wife, tho' no Assets come to his Hands 301
Devastavit returned against Baron and Feme, the Feme dies, the Husband shall be charged 302

E,

Ejectment.

Ease of Ejectment by Baron and Feme 330

Election.

Where it is at the Election of the Husband to join the Wife with him in Actions 312, 326
Election as to the Woman's taking by Jointure or Dower 165, 175

Elopement. 109, 117

Emblements.

Where the Wife shall have the Emblements, and where the Husband 245, 246

Error.

Where Baron and Feme shall join in a Writ of Error or not 352
K k 3 Husband

The T A B L E.

Husband cannot assign Error without the Wife to reverse Outlawry against them	Page 353
Error may be assigned that she was a Feme Co- vert at the time of the Appearance, though she appeared and pleaded as a Feme sole	414
Writ of Error brought by all for the Coverture of one	424

Escape.

Where Baron and Feme shall join in Escape or not	343
Debt on Escape against Baron and Feme	378,
	379
The Escape of the Husband is the Escape of the Wife	<i>ibid.</i>
Baron and Feme in Execution and the Wife escapes, whether the Action lies against the Sheriff	426

Espoufals.

Espoufals what	4
----------------	---

Estoppel. *Vide 332*

Where the Sheriff shall take Advantage of an Estoppel	417
--	-----

Evidence.

By Evidence of the Wife she and her Husband were discharged of a Judgment	420
Husband admitted to be a Witness, and where not	421

Cramp.

The T A B L E.

Examination.

Of a Feme on a Fine levied

Page 182

Execution.

Judgment and Execution in Dower 135, 144
Baron and Feme obtain Judgment in Debt in
the Right of his Wife the Wife dies, yet the
Husband shall have Execution on this Judg-
ment, and not the Administrator of the Wife,

Q.

423

In what Cases a Feme Covert may be taken
in Execution, or not

423, 424

Executoꝝ. Vide Administrator.

How a Feme Covert may make an Executor
and how she may be made an Executrix 292

If a Feme Covert dies intestate, in what Cases
Administration shall be granted of her Goods

ibid.

What Things the Administratrix of the Wife
shall have, and not the Husband

293

Debt recovered by Baron and Feme Executrix,
and they have Judgment, the Feme dies, the
Baron shall not have Execution

294

Feme Legatee and Executrix.

295

What Things Feme Covert Executrix may do
without her Husband

ibid.

Obligee makes the Wife of one of the Obligors
Executrix, *Quid operatur*

296

Obligor makes the Executrix of the Obligee his
Executrix, *Quid operatur*

ibid.

Feme Executrix of the Debtee takes the Debtor
to Husband, *Quid operatur*

ibid.

K k 4

Feme

The T A B L E.

Feme Executrix takes the Debtor to Husband, <i>Quid operatur</i>	Page 296
Feme Obligee takes the Obligor to Husband	297
Executrix made divers Bonds to the Creditors of the Testator, and then marries, the Husband may release to the Value of the Testator's Goods	<i>ibid.</i>
Where the Husband shall be charged with the Waste of the Wife Administratrix, <i>vide De-</i> <i>vastavit</i>	
Debt on Bond by Baron and Feme Executrix, and they have Judgment, Feme dies, the Husband shall not have Execution, and why	303
Actions brought by Baron and Feme as Execu- tor or Administrator	305

Extinguishment.

Extinguishment of Debts	296
Agreements between Baron and Feme extin- guish'd by Marriage	53, 298
Where and by what means a Term is extin- guishable	59, 302
Diversities between a Feoffment and Bargain and Sale as to the Extinguishment of the Term of the Wife	267

Extents.

Extents of the Wife's Term	267, 305
----------------------------	----------

Exchange.

The TABLE,

Exchange.

Of the Husband's Exchange of the Land of the
Wife, and what shall be a good Confirmation
of it by the Wife, &c. Page 177, 221, 222
In Dower 145, 153

F.

Feme Covert.

THE Nature of Coverture	7
In what Cases Feme Covert and Infant differ	8
In what Case the Child may choose his own Father	16
Privileges of a Feme Covert	28
What Privilege the Wife shall have by Reason of her Husband's Privilege in Actions	31
What the Husband gains of the Wife's Fee- simple by the Intermarriage	61
Formedon in Reverter by Baron and Feme	325

Forfeiture.

What Acts, Charges or Forfeitures of the Hus- band shall bind the Wife after his Death, <i>Vide Charge</i>	70
What Act of the Husband amounts to a Forfei- ture of the Wife's Land	75
What Acts of the Husband amount to a Forfei- ture of the Wife's Copyhold Estate	248, 249
Of	

The T A B L E.

Of a Feme sole Merchant	Page 355, 356
Where a Feme Covert may sue sole	372
Of a Feme Covert's being a Purchaser, and how it shall be good	112
Feoffment by the Husband of the Wife's Land	217
Feoffment of the Husband destroys a Contin- gent Use	ibid.

Fine.

The Reason why a Feme Covert is bound by her Fine	170
Of a Fine levied by a Feme Covert as Feme Sole	171
The Operation of a Fine by Baron and Feme	172
Stat. 32 H. 8. cap. 28. explained	173
Feme by Fine bars herself of a Possibility	174
Where a Fine enures as a Release	ibid.
Feme Covert by a Warranty in a Fine <i>for Con-</i> <i>cessit</i> is bound in an Action of Covenant	175
Fine by the Wife docks a Trust	177
Baron and Feme levy a Fine, the Feme being within Age, the whole Fine shall be reversed, and not <i>quod uxorem</i> only	ibid.
Entry of the King's Silver	179
Of Commissioners taking a Fine of a Feme Co- vert	181
Where a Feme Covert shall be examined, or not	182
When and where a Feme Covert shall be bar- red by <i>Fine</i> and Nonclaim	183
Declaration of Uses on a <i>Fine</i>	184
Where Baron and Feme shall join in a <i>Forcible</i> <i>Entry</i>	352

Quar-

The T A B L E.

G.

Guardian.

Feme Covert Infant levied a Fine, in Error
the Court will not permit the Husband to
disavow a Guardian Page 178

Grant.

Where and in what Cases the Wife's Grant, if
she join with her Husband, shall be void or
not 218, 219
Of Christian Names of Men and Women in
Grants 223
By Grant of *Omnia bona & catalla*, what pas-
seth 306

I.

Indictments.

Against Baron and Feme 315, &c.
Of Perjury 451

Informations, &c.

Against a Feme Covert for selling Flesh ibid.
Of Recusances 385, &c.
Where and in what Cases Wives are indictable
without their Husbands 315, 387

Infant.

Wherein Infant and Feme Covert differ 8
The exact Time for the Birth of an Infant 12
Where the Child may chuse his Father 16
The Court is to judge of the Infancy of a Feme
Covert, and not the Jury 170, &c.

Join.

The T A B L E.

Jointures.

The Nature and Reason of them	Page 150
What Estates or Jointures within the Stat. 27	
<i>H. 8. cap. 10. or not</i>	151
What is a good Jointure within the Stat. 11. <i>H.</i>	
7. <i>cap. 10.</i>	155
What is a good Consideration within that Stat.	
	158
What Agreement or Waiver a Woman may make as to her Jointure	165, &c.
Pleadings as to Jointure	168, &c.
Where Baron and Feme shall be Joint-Tenants, or take by Moieties or Intierties	209, &c.
What amounts to a Severance of the Jointure	
	<i>ibid. & 214</i>

Joinder in Action.

Where and in what Action Baron and Feme shall join, or not	318, 335, 340
Set out in four or five Rules	<i>ibid.</i> and 341
In what Cases the Husband only shall have the Action	319, &c. <i>Vide</i> 341
Where they are to join, or be joined in Case for Words	366, 379

Judgment.

In Trover	374
In Debt	377
In Dower	141, 144
Judgment in Case for scandalous Words brought by Baron and Feme	370, &c.
Judgment in Trespass against Baron and Feme, <i>quod capiantur</i> , where good or not	379
By	

The T A B L E.

By Evidence of the Wife she and her Husband were discharged of a Judgment	Page 420
Where Judgment against Baron and Feme shall bind the Husband surviving, or not	422
Where the Husband shall be charged with a <i>Devastavit</i> ; and so shall the Wife if she sur- vive	<i>ibid.</i>
Debt on Bond against Baron and Feme, and Judgment; the Wife dies, yet the Husband shall be charged	423
If a Feme die after a Verdict, no Judgment can be given against the Husband	424
In Action against Baron and Feme, where Judg- ment shall be <i>quod capiantur</i>	425
Where Baron and Feme must be both in <i>mise- ricordia</i>	426

L.

Lease. Vide Term.

L ease by the Husband of the Wife's Land, and how and wherein it shall bind the Wife, or not	224
Wherein a Lease enures by way of Interest, and not by way of Estoppel	225
Of Lease for Lives made by Baron and Feme, and what shall be a good Lease warranted by Stat. 32 H. 8. cap. 28. and the Qualifications of such Leases to bring them within the Sta- tute	226
What Acceptance of the Husband shall affirm a voidable Lease	228
	Provi-

The T A B L E.

**Provisoes and Powers to make Leases. *Vide*
Provisoe.**

Lease of Ejectment by Baron and Feme *Page* 230

Leases for Years made to Baron and Feme 231

**Diversity between a Lease for Life, and a Lease
for Years made to a Feme Covert *ibid.***

**When the Husband shall be Affligtee to the
Wife *ibid.***

**When an Estate made to a Feme Covert *de novo*
shall vest, and when a new Lease made to a
Feme who was Lessee before *ibid.***

Lease for Life made to Baron and Feme *ibid.*

**Lease to Baron and Feme for their Lives, the
Remainder to the Survivor of them for Years;
the Husband grants over the Term for Years;
and dies, the Wife shall have it, as if the Re-
mainder had been to the Executors of the
Survivor 232**

**How if the Remainder had been to the Heirs of
the Survivor *ibid.***

Lease for Life made by Baron and Feme *ibid.*

***Liberty. Vide* 227**

**Diversity where Livery is made by the Lessor
in Person, and where by Letter of Attorney
233**

**Livery within the View not revoked by Mar-
riage 50, 51**

Legacy.

**A Legacy to the Feme released by the Husband
69, 70, 71**

Of a Feme Covert's Assent to a Legacy 239

What

The TABLE.

What is a good Assent or Claim as Executor,
or as Legatee Page 295

M.

Marriage.

- W**HEN the Solemnization of Marriage
in the Church began 3
- Marriage out of the Canonical Hours, and in a
Publick House late at Night; good if done
by one in Orders *ibid.*
- Libel for marrying without License *ibid.*
- Of Change of Name by Marriage 9
- Time of Agreement or Disagreement to the Mar-
riage, when they marry *infra annos nubiles* 33
- What Marriages are within the Levitical De-
grees, or not 36, &c.
- Whether if Marriage be within the Levitical
Degrees, or not, be determinable at Law, or
not 39
- Diversity between a Marriage in Right and a
Marriage in Possession, or *de facto*, and the
Consequence thereof in Pleading *ibid.*
- What Alterations are made by the Intermar-
riage, as to Name, as to Alteration of Estates,
as to Lease or Leases, Actions. *Vide Tit. Ac-
tions* 49
- Where and in what Cases Marriage shall amount
to a Countermand, Revocation, Release, Sus-
pension, or Extinguishment. 50, 51, 52, 53,
54, 55

The T A B L E.

Of Livery, of Attornment, of a Will, of an
Exchange, or of Arbitrament, or Copyhold
Page 51, 52

Mortgage.

How a Woman shall be endowed in Law of Lands mortgaged	110, 111
What Conditions in Mortgages shall survive to the Husband, or not	263
If the Mortgage of the Wife's Term does amount to a Disposition in Law	264, 265
Of a Feme sole Merchant	354, 355, 356
Endowment by <i>Meets and Bounds</i>	106, 126
Suit against a Woman for exercising the Trade of <i>Midwife</i>	357
Where the Baron and Feme shall take by Moie- ties, and where by Intierties. <i>Vide Jointure.</i>	

N.

O F Christian Names of Men and Women in Grants	223
--	-----

O.

B Y the Outlawry, &c. of the Husband, the Wife's Term is a Gift in Law	267, 270
--	----------

The TABLE.

By Outlawry the Husband forfeits nothing of the Goods which the Wife had as Executrix

Page 304

Latitat against J. S. and his Wife, the Wife was arrested, but the Husband could not be taken; nothing can be done in this Case, without Bail be put in by the Husband, and the Wife was discharged, but the Remedy is by Outlawry

393

But some say she shall lie in Prison till the Husband appear for her

ibid.

In Process of Outlawry Bail refused for the Contempt of the Wife.

397

Process against them till Exigent, no *Supersedeas* shall be received for the Husband without the Wife

398

Exceptions to avoid an Outlawry of Baron and Feme

399

She may not plead to Outlawry without her Husband

400

Outlawry pleaded

416

P.

P *Artus sequitur Ventrem*; where the Rule holds not

21

Paraphernalia, what

79, 80

Perjury.

Baron and Feme convict of Perjury

451

L 1

Plead.

The T A B L E.

Pleading.

How a Man must plead the having of Issue to intitle him to be Tenant by the Courtesy	Page 98, 99
Pleadings in Dower	133, &c.
Pleadings as to Jointures	168, 169
Plea in Abatement by Marriage or Death	408
Where <i>Non est factum</i> may be pleaded to a Bond	334, 409
Pleadings in Appeal	362, 363
The Wife cannot plead by herself	380
Where the Wife shall plead and have the same Advantage in Pleading, as if she were a Feme sole	407
Of the Wife's Pleading without the Husband	<i>ibid.</i>
Of pleading Coverture	408
Of the Plea of <i>sola & innupta</i>	<i>ibid.</i>
Why Feme Covert may plead <i>Non est factum</i> , and so cannot an Infant	409
Conclusion of Pleas	410
<i>Modo & forma</i> , the Effect of it in Pleading	412
Plea by Estoppel	411
<i>Nil detinet</i> pleaded to Action for Arrears of Rent	414
Marriage averred	<i>ibid.</i>
Release pleaded in <i>Assumpsit</i>	415
Divorce pleaded	415 and 438
Outlawry pleaded	416
Where the Parol shall demur for the Nonage of the Wife, or not	417
Pleading in Divorce	438
<i>Polygamy</i> , Cases thereof	441, 442

POM:

The T A B L E.

Possibilities.

Possibilities not vested in the Husband by Inter-marriage	Page 265
Precontract, the Effect of it in the Civil Law	41

Prescription.

Prescription for common <i>in jure uxoris</i>	350
Prescription alledged in Baron and Feme	403

Privileges.

Privileges of a Feme Covert	29
Privileges in Suits	31
Husband may not have Privilege as Attorney, when Action is brought against him and his Wife	396, 397

Property.

Diversity between Property in personal Goods, and a bare Possession	63, 64
Provisoes and Powers to make Leases	227, 230
Prohibition not to trust his Wife, the Force of it	274

The TABLE.

Q

Quare Impedit. Vide 62

WHether Baron and Feme shall join there-
in Page 365

Queen.

How she is an exempt Person from the King 26
Queen Consort or Queen Dowager in Case of
Treason, how to be tried 27
The Penalty for any to marry the Queen Dow-
ager without the King's License 28
Privilege of the Queen's Tenants *ibid.*

R.

Rationabili parte bonorum. Vide Writs.

Recovery Common, 186, 187

WHether a Feme Covert to be examined
in a Recovery 187
The Baron only is vouched, *Quid operatur.* 188
How a Feme Covert may be Tenant to a *Pra-*
cipe 189
Baron and Feme suffer a Recovery as Vouchees,
it is a Forfeiture 189

The

The T A B L E.

The Wife within Age in a Common Recovery, how to appear	Page 190
Recovery by Default	<i>ibid.</i>
Custom of <i>London</i> as to Recoveries	<i>ibid.</i>
Where a Recovery binds not the Wife's Moiety	212

Recusancy.

Information of Recusancy against Baron and Feme	385, 387
--	----------

Release.

What Things the Husband may release or dis- charge, or not	68
Release pleaded, in <i>Assumpsit</i>	415
Promise cannot be released till it come in <i>Esse</i>	<i>ibid.</i>
Release of the Husband of the Wife's Right	214, 220
Release of Money to be paid after the Wife's Decease, not good	221

Remitter.

The Nature and Reason of Remitter	201
What Act shall make a Remitter to the Wife	202
Remitter wrought by a voidable Estate	203
Remitter to Baron and Feme maugre the Hus- band	<i>ibid.</i>
Remainder expectant on Estate for Life work- eth no Remitter	204

The T A B L E.

Remainders remitted	Page 204
Remitter by Acceptance	205
Where the Wife being remitted during the Coverture, may after the Death of her Husband waive her Remitter, and where not	<i>ibid.</i>
Where the Feme shall be in her Remitter <i>nolens volens</i>	206
No Disagreement of the Husband shall devest the Remitter	207

Rent.

Rent not to be reserved to a Stranger	241
The Husband grants a Rent out of the Wife's Term, and dies; if the Wife shall hold it discharged, and why	243, 243
What Arrears of Rent the Stat. 32 H. 8. c. 37. gives the Husband Power to receive	243
Feme Covert receives the Rents, the Terretenants not having Notice of the Coverture; they must be paid again to the Husband	<i>ibid.</i>
Where the Husband shall be charged with the Arrears of the Rent	244, 378
Avowry for Rent out of the Wife's Land, how to be brought	<i>ibid.</i>
Where the Executör of the Husband shall have the Rent, and not the Wife	<i>ibid.</i>
Debt for Rent against Baron and Feme	<i>ibid.</i>
In Replevin, if the Husband may avow sole for the Rent	328, 351

Request.

What is not a reasonable Request to levy a Fine	180
Receipt.	

The TABLE.

Receipt.

Where the Wife shall be <i>received</i> upon the Husband's Default, and <i>econtra</i>	Page 390
Rescous by Baron and Feme	351

S.

Seisin in Deed and Law	96
What Seisin of the Wife it must be which makes the Husband Tenant to the Courtesie	<i>ibid.</i>
In what Cases a Man shall be Tenant by the Courtesie of a Seisin in Law	<i>ibid.</i>

Separate Maintenance.

Of separate Maintenance and Disposition of the Wife	254
Separate Maintenance on a <i>Proviso</i> , and the Pleadings	255
Money saved by the Wife out of her separate Maintenance, is to be disposed of by her	257

Separation.

Covenants in a Deed of Separation between Baron and Feme, and for Allowance of yearly Maintenance and Pleadings thereon	257,
	258

The F A B L E.

Statute.

Stat. <i>Gloucest. cap. 5.</i>	Page 384
Stat. 27 <i>H. 8.</i> Of Jointures, explained 151,	152
Stat. 32 <i>H. 8. 28.</i> explained	195, 196, 226
Stat. 13 <i>El. c. 2.</i> explained	218
Stat. 39 <i>El. c. 8.</i> Concerning Rape	447
Stat. 5 <i>El. c. 9.</i> For Non-appearing <i>ad Testifi-</i> <i>candum</i>	440
Stat. 3 & 4 <i>W. & M. c. 9.</i> Women allowed Clergy	317
Stat. 1 <i>Jac. c. 11.</i> Of Stealing Women	443
Where the Husband must be joined with the Wife in Offences against a Statute-Law, and where not	387
All Statutes which provide for an actual Wrong, a Feme Covert shall be intended within them	451

Spoliation.

Prohibition against a Spoliation	302
Suits against Baron and Feme in Chancery	400, &c.

Surrender. Vide Coppyhold.

Surrender, what	220
Surrender by the Husband of the Wife's Land, how it operates	<i>ibid.</i>
What shall amount to a Surrender	<i>ibid.</i>

The T A B L E:

T.

Term. Vide Lease.

W hat Power the Husband hath over the Wife's Term	Page 262
What amounts to a Disposition of the Wife's Term by the Husband, so as to vest it in his Executors and Administrators	262, 263
Term in Interest though not in Possession	263
Where the Wife's Term vests in the Husband by Payment of Debts	272
What shall amount to a Forfeiture of the Wife's Term, or not	267, 270, 273

Trust.

What Trusts of the Wife the Husband shall dispose or not	268
Fine by the Wife docks a Trust	273
The Husband cannot grant or charge the Term of the Wife in Trust	269
The Husband cannot forfeit the Wife's Term in Trust for Outlawry or Felony	270
Annuities purchased in Trust for the Wife, yet the Arrears decreed to the Husband	272

Traverse.

Traverse, where not allowable	416
-------------------------------	-----

Trespas.

The T A B L E.

Trespas.

Where in Trespas of Battery the Baron and Feme shall join, or not; and the Declaration how to be in such Case	Page 337
Of Trespas done to the Estate and Freehold of the Wife; how they shall join in Action	341
Trespas brought by Baron and Feme	338

Trover.

Trover by Husband of the Wife's Goods, &c.	319, 320
Trover against Baron and Feme, and Declaration, &c.	374, 375, &c.

Trial.

Trial of a Bastard, where and how	16, 22
Where it shall be by the Bishop's Certificate, and where <i>in Pais</i>	43
If the Issue be whether a Feme Sole or Covert, where to be tried	<i>ibid.</i>
The Issue <i>n'ung; accouple, &c.</i> where to be tried	44, 45
The Form of the Bishop's Certificate	46
Trial in Appeal,	364
Death of Husband, where triable, and how	418

Tithes.

In Debt for Tithes Baron and Feme may join	329
	V.

The TABLE.

V.

Verdict on Trespass and Assault by Baron
and Feme *Page 338, &c.*
Verdict in Case against Baron and Feme 380

Voucher.

Where a Feme shall vouch her Husband 189,
208

Writ *de Ventre Inspiciendo*. *Vide Writ.*
Uses declared on a Fine 184, 185

W.

Wager.

Wager of Law by Baron and Feme 391

Warranty.

Feme Covert by Warranty in a Fine *sur concess-*
fit, is bound in an Action of Covenant 175
Where a Warranty descending on an Infant, or
a Feme Covert, shall be a Bar or not 207,
208

Waste. *Vide Devastavit.*

Husband commits Waste, if this shall bind
the Wife 382, &c.

Of

The T A B L E.

Of Baron and Feme joining in Action of Waste,
Page 333

Feme Sole commits Waste, and then marries,
the Writ shall be, the Woman while Sole
committed the Waste *383*

Husband seised for Life of the Wife, and in her
Right doth Waste, and after the Wife dieth,
no Action of Waste lies against the Husband
in the *Tenuit* *ibid.*

Will.

If a Will be countermanded by the Intermar-
riage *51, &c.*

Jointures devised by Will *164, 165*

How and in what Cases a Feme Covert may
make a Will *235, 236*

What a Woman may not devise without the
Consent of her Husband *ibid.*

Of Declaration made by a Feme Covert in Na-
ture of a Will *236*

Cases of the Husband's being bound to permit
his Wife to make a Will *237*

Devises to the Wife by the Husband and others,
and the Construction of such Will *238*

Devise by Implication *ibid.*

If the Husband may devise the Term made to
him and his Wife *239*

Where the Husband may plead as a Devise to
him sole *ibid.*

Witnesses. Vide Evidence.

Words.

Action for scandalous Words *366, 367, &c.*

Writ.

The · T A B L E.

Writ.

Writ <i>de Ventre Inspiciendo</i> ; the Form of the Petition for such Writ	Page 11, 12
Writ <i>de Ventre Inspiciendo</i> in Case of a Widow, and in Case of a Wife	14, 15
<i>De rationabili parte bonorum</i>	47, 48, 145
<i>Quod ei Deforceat</i> , where it lies	191

The new Cases added in this Edition, are chiefly Chancery-Cases; and are for the most part inserted as follows:

Cap. VIII. p. 55, &c.

IX. p. 67, 73, 78, 81, &c. 86, &c.

XI. p. 111, 112, 120, 121, &c. 147,
&c.

XII. p. 159, &c. 166, &c.

XIII. p. 176, 180, 185, &c.

XX. p. 253

XXI. p. 259, &c.

XXII. p. 270, 271

XXIII. p. 274, &c. 289, &c.

XXIV. p. 304, &c. 307

XXVI. p. 327, 345, 347

XXVIII. p. 400, &c.

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